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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

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AMERICAN STATE REPORTS.

VOL. LXXXII.

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(25)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

FULLER v. STATE.

[122 Ala. 32, 26 South. 146.]

PARDONING POWER—CONDITIONS.—The pardoning power conferred by a state constitution upon the governor includes the power to grant conditional pardons, the condition to be either precedent or subsequent, and of any nature so long as it is not illegal, immoral, or impossible of performance. A breach of the condition avoids and annuls the pardon.

PARDONING POWER—PAROLE OF PRISONERS—CONSTITUTIONAL LAW.—The parole of a convict is in the nature of a conditional pardon and within the constitutional grant of the pardoning power to the governor. The legislature may enact laws to render its exercise convenient and efficient. Hence the legislature has power to enact a law providing that the governor may suspend sentence, and parole convicts on good behavior, and that if a convict fails to observe the terms of his parole he may be rearrested and required to serve out his sentence.

PARDONING POWER—PAROLE—BREACH OF CONDITION.—Under a statute providing that a paroled convict, upon the failure to observe the conditions of his parole, may be rearrested and required to carry out the sentence of the court as though no parole had been granted, he may, even after the time at which the sentence would have been ended but for its suspension, be remanded to custody that the unserved part of the sentence may be executed upon him.

PARDONING POWER—BREACH OF PAROLE—SUMMARY REARREST.—A statute providing for the parole of convicts upon good behavior, and authorizing the governor to determine whether the condition of the parole has been complied with, and to order a summary arrest, is not unconstitutional. The convict is at large by the mere grace of the executive, having accepted the executive clemency upon conditions. Upon the breach of those conditions the parole is avoided and he becomes merely an escaped convict.

Fuller filed a petition alleging that he was illegally detained in custody and prayed that he be discharged. He was convicted in August, 1896, of assault to commit murder and sentenced to five years. In November, 1896, his sentence was commuted to one year. In February, 1897, he was paroled by the governor. In March, 1898, the governor, upon being informed that Fuller had violated the conditions of his parol, ordered him taken into custody to serve out his unexpired term. The judge refused to discharge the prisoner.

John W. A. Sanford, Jr., for the appellant.

Charles G. Brown, attorney general, for the state.

§§ McCLELLAN, C. J. Section 12 of article 5 of the constitution confers the pardoning power on the governor in this language: "The governor shall have power to remit fines and forfeitures, under such rules and regulations as may be prescribed by law, and, after conviction, to grant reprieves, commutation of sentence, ³⁷ and pardons, except in cases of treason and impeachment."

It is the settled law that this grant includes power to grant conditional pardons, the condition to be either precedent or subsequent, and of any nature so long as it is not illegal, immoral, or impossible of performance; and that a breach of the condition avoids and annuls the pardon: *Ex parte Wells*, 18 How. 307; *Woodward v. Murdock*, 13 Crim. Law Mag. 71, and notes; *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395; *State v. Barnes*, 32 S. C. 14, 17 Am. St. Rep. 832, 10 S. E. 611, and cases cited; *State v. Wolfer*, 53 Minn. 135, 39 Am. St. Rep. 582, 54 N. W. 1065, and cases cited; note to *People v. Cummings*, 88 Mich. 249, 50 N. W. 310, 14 L. R. Ann. 285.

The parole of a convict is in the nature of a conditional pardon and within the constitutional grant of the pardoning power to the governor. The power to grant pardons, absolute or conditional, cannot, of course, be taken away from the executive, nor limited by legislative action; but the general assembly may enact laws to render its exercise convenient and efficient: *Kennedy's Case*, 135 Mass. 48.

The legislature of this state has enacted such a law in respect of that description of conditional pardons known as "paroles," and this statute is now embodied in sections 5461 and 5462 of the code, which are as follows:

"5461. Governor may suspend sentence, and parole convict on good behavior.—The governor may, whenever he

thinks best, authorize and direct the discharge of any convict from custody and suspend the sentence of such convict without granting a pardon, and prescribe the terms upon which a convict so paroled shall have his sentence suspended.

"5462. Convict failing to observe terms of parole may be rearrested and required to serve out sentence.—Upon the failure of any convict to observe the conditions of his parole, to be determined by the governor, the governor shall have authority to direct the rearrest and return of such convict to custody, and thereupon said convict shall be required to carry out the sentence of the court as though no parole had been granted him."

These sections are really not open to construction; and little need be said in their interpretation. The ^{ss} parole does not in anywise displace or abridge the sentence; it merely stops its execution for a time only, it may be, or indefinitely, it may prove—it suspends, not destroys. The suspension is like that which occurs constantly in the administration of criminal laws where the defendant appeals from the judgment of conviction. The execution of the sentence is by the appeal superseded and postponed pending the appeal; and if the judgment is affirmed the execution of the sentence thereupon begins and continues for the period set down originally in the judgment. So the word is used in this statute; and upon condition broken, the sentence, which has all along hung in its entirety over the liberty of the paroled convict, is to be executed upon him "as though no parole had been granted to him." This is the plain meaning of the statute; and, so interpreted, it involves of necessary consequence the proposition that upon condition broken even after the time at which the sentence would have ended but for its suspension, the convict may still be remanded to custody that the unserved, and hence unexpired, part of the sentence—that part which he was released from serving during the period of durance originally specified—may be executed upon him. So the law is written.

That it was competent for the legislature to so provide we entertain no serious doubt. A parole, like every other pardon, is subject to rejection or acceptance by the convict. He has an unfettered election in that regard, and the executive order is not effective or operative until it has been accepted by him. If he prefers to serve out his sentence, as originally imposed upon him, to a suspension of it by subjecting himself to the conditions nominated in the parole, he has the clear right to

do so. But if he elects to accept the parole and avails himself of the liberty it confers, he must do so upon the conditions upon which alone it is granted to him. One of these conditions is that his sentence shall continue in fieri, and that the government shall have the power to execute it in full upon him should he forfeit the liberty and immunity conditionally secured to him by the executive order. That a convict having only a short ³⁰ time remaining of his sentence would make an unwise choice by accepting a parole upon onerous conditions, for a breach of which he might years after be remanded to complete his sentence, affords no argument against the constitutional integrity of the enactment. That a person cannot by convention with the governor become a convict, and that by mere convention with the executive a convict cannot alter his term of servitude, or the dates at which it is to begin and end, is no impeachment of a statute which provides for such alterations—for the suspension of a sentence during a part of its original period, and its execution as to such part at a time beyond that fixed in the judgment of conviction for its termination. The same power which provides for the original sentence, the law-making power of the land, provides also, in this instance, for its suspension, and for its ultimate execution, in a given contingency, at another and different time; and it is equally potent in both respects. And the postponing of the sentence in such case is not merely by convention with the governor, but is by force of a potential statute well within legislative competency to deal with the execution of sentences imposed upon convicts. It is the law that in such case postpones under certain circumstances the execution of the sentence to another time, just as it is the law which postpones, upon appeal taken, the execution of sentence until another time. So it has been ruled of a similar statute in Massachusetts: *Conlon's Case*, 148 Mass. 168; such is the view of the supreme court of Minnesota expressed in a well-considered opinion: *State v. Wolfer*, 53 Minn. 135, 39 Am. St. Rep. 582, 54 N. W. 1065; and in South Carolina a like result is rested alone upon the governor's constitutional pardoning power: *State v. Barnes*, 32 S. C. 14, 17 Am. St. Rep. 832, 10 S. E. 611, and cases there cited. And at an earlier day it was supposed in Massachusetts to be necessary to provide by statute that the time during which the convict is at large under parole should be deducted from the unexpired sentence upon his remandment for breach of the condition of the parole,

to the end that he should not be made to serve beyond the time fixed for the termination of the original sentence: *West's Case*, 111 ⁴⁰ Mass. 443. This statute was afterward amended as indicated in *Conlon's Case*, 148 Mass. 168. See, also, on the general question of the constitutionality of statutes providing for paroling convicts, *State v. Peters*, 43 Ohio St. 629.

But it is insisted that this statute, in so far as it undertakes to authorize the governor to determine that the condition of the parole has not been complied with, and the summary arrest of the convict thereupon by the direction of the governor, and his summary return or remandment to servitude or imprisonment under the sentence, is violative of organic guaranties of jury trial, that no warrant shall be issued to seize any person without probable cause supported by oath or affirmation, etc. This position takes no account of the fact that the person being dealt with is a convict, that he has already been seized in a constitutional way, been confronted by his accusers and the witnesses against him, been tried by the jury of his peers secured to him by the constitution and by them been convicted of crime, and been sentenced to punishment therefor. In respect of that crime and his attitude before the law after conviction of it he is not a citizen, nor entitled to invoke the organic safeguards which hedge about the citizen's liberty, but he is a felon, at large by the mere grace of the executive, and not entitled to be at large after he has breached the conditions upon which that grace was extended to him. In the absence of this statute, a convict who had broken the conditions of a pardon would, if there were no question of his identity or the fact of breach of the conditions, be subject to summary arrest and remandment as matter of course to imprisonment under the original sentence by the court of his conviction or any court of co-ordinate or superior jurisdiction—a purely formal proceeding. If the person arrested denied his identity with the convict sought to be remanded, he might be entitled to a jury trial on that issue alone. If he denied only the alleged breach of the conditions of his enlargement, he would not be entitled to a jury on that issue, but it would be determinable in a summary way by the court before whom he is brought. ⁴¹ But the statute supervenes to avoid the necessity for any action by the courts in the premises. The executive clemency under it is extended upon the conditions named in it, and he accepts it upon those conditions. One of these is

that the governor may withdraw his grace in a certain contingency, and another is that the governor shall himself determine when that contingency has arisen. It is as if the convict, with full competency to bind himself in the premises, had expressly contracted and agreed that whenever the governor should conclude that he had violated the conditions of his parole an executive order for his arrest and remandment to prison should at once issue, and be conclusive upon him. Of course, if in the execution of the order of arrest the wrong man should be taken, he would be entitled to enlargement on habeas corpus; but there is no question of identity in the case before us. Upon such determination by the governor, evidenced by the executive order of arrest, the parole is avoided and the person who has been at large upon it at once falls into the category of an escaped convict, so far as measures for his apprehension and remandment under the original sentence is concerned, and he is no more than an escaped convict entitled to freedom from arrest except upon probable cause supported by oath or affirmation, nor to a trial by jury, nor to his day in court for any purpose: *Kennedy's Case*, 135 Mass. 48; *Conlon's Case*, 148 Mass. 168; *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395; *State v. Wolfer*, 53 Minn. 135, 39 Am. St. Rep. 582, 54 N. W. 1065.

Appellant relies mainly upon the case of *People v. Cummings*, 88 Mich. 249, 50 N. W. 310, decided by the supreme court of Michigan. Neither the argument nor the conclusion in that case is satisfactory, and its unsoundness is demonstrated, we think, in the notes appended to the report of it in 14 L. R. Ann. 285.

The order of the probate judge denying the convict's petition for habeas corpus is in consonance with the foregoing views, and it will be affirmed.

A PARDON MAY BE GRANTED ON CONDITIONS: See the monographic note to *State v. McIntire*, 59 Am. Dec. 576; *Ex parte Hawkins*, 61 Ark. 321, 54 Am. St. Rep. 209, 33 S. W. 106. If the prisoner fails to perform the conditions, the original sentence remains in full force and may be carried into execution: See the monographic note to *State v. McIntire*, 59 Am. Dec. 577; *State v. Barnes*, 82 S. C. 14, 17 Am. St. Rep. 832, 10 S. E. 611. He is not entitled to trial by indictment, or on a written rule to show cause, or to receive any more formal notice than an application would be made to pass sentence on him than when his sentence was originally passed: *State v. Chancellor*, 1 Strob. 347, 47 Am. Dec. 557. The condition annexed to the pardon may be that, on a breach thereof, the recipient shall be liable to summary arrest upon the governor's warrant: *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395.

LODGE v. STATE.

[122 Ala. 97, 26 South. 210.]

WITNESSES, CREDIBILITY OF—SHOWING STATE OF FEELINGS OF.—It is competent to show the state of feeling of a witness when called to testify, for the purpose of giving the jury all the facts necessary to a full and fair consideration of his evidence, and to enable them to determine the degree of credit to be accorded thereto.

WITNESSES—BIAS OF—PARENTS' ILL-WILL KNOWN TO CHILD.—Where a child of fourteen is the chief witness for the prosecution in a criminal case, it is proper upon cross-examination to ask such child as to the state of bad feeling of its parents toward the defendant, if it be a fact, and such state of feeling is known to the child, such evidence being admissible and competent to affect the credibility of the witness.

TRIAL—IMPEACHMENT OF PERSONS NOT CALLED AS WITNESSES.—EVIDENCE tending to impeach persons who did not testify as witnesses in the case is inadmissible.

WITNESSES—IMPEACHMENT OF—EVIDENCE OF BAD CHARACTER.—The testimony of a witness may be impeached by proof of general bad character.

Daniel & Brindley, for the appellant.

Charles G. Brown, attorney general, for the state.

98 DOWDELL, J. The defendant was tried and convicted of carrying a pistol concealed about his person. The prosecution began upon a warrant issued upon the affidavit of one Otto Gordon, who was the principal witness for the state upon the trial of the defendant, was a boy fourteen years of age, and the son of M. and Mrs. A. Gordon. The defendant sought to prove by this witness on cross-examination, ill-will and a state of bad feeling on the part of both M. Gordon and Mrs. A. Gordon toward the defendant. This testimony was objected to by the state, on the ground that it was irrelevant and immaterial, and the objection was sustained. The defendant also sought to prove by this witness, as tending to show ill-will on the part of M. Gordon, the father, toward the defendant, the fact of a prosecution then pending against the defendant, commenced on affidavit of M. Gordon, charging him with adultery with one Belle Turner, which evidence was objected to by the state and the objection was sustained by the court.

That it is competent to show the state of feeling of a witness when called to testify cannot be doubted, the purpose being to

give the jury all of the facts necessary to a full and fair consideration of his evidence, and to enable them to determine the degree of credit to be accorded the same.

It was decided in *Prince v. State*, 100 Ala. 144, 46 Am. St. Rep. 28, 14 South. 409, that it was competent for the defendant in a prosecution to show that the employer of a witness, testifying in behalf of the state against the defendant, was taking interest in the trial of the case, the court using in that case the following language: "In weighing testimony, the jury ought to be in possession of all the facts calculated to exert any influence upon the witness. It cannot be said as a conclusion of law that an employé testifying in a matter in which he knows his employer is interested personally or pecuniarily is, or is not, wholly unbiased. It is proper for the jury to know the character of the interest of the employer, how it is to be affected, and in what way it is manifested. An employer may act from a sense of public duty, or be interested in seeing that another has a fair trial; or it may be that he is actuated ^{so} by pecuniary interest, or a spirit of revenge or vindictiveness, and may use his position as employer to bias the evidence of his employé. We think it safe to hold, that when an employé is testifying, it may be shown that his employer is interested in the prosecution."

While it cannot be stated as a conclusion of law that a son of tender years testifying against a party toward whom his parent entertained ill-feelings, that his testimony would or would not be wholly unbiased, nevertheless, it being but natural for the child to be more or less impressed with the sentiments and feelings of the parent, it is proper for the jury to be informed as to the state of bad feeling of the parent toward the defendant, if it be a fact, and such state of feeling is also known to the child. We think the reasoning for the admissibility of evidence of this character is more cogent in the case of a child, who is under parental care and control, testifying as a witness, than in the case where the relationship is only that of employé and employer. This evidence should have been allowed and the court erred in sustaining the solicitor's objection.

There was no error in the refusal of the court to allow the defendant to introduce impeaching evidence as to M. Gordon and Mrs. A. Gordon, neither one of these persons having testified as witness in the case. Nor was there any error in admitting the evidence as to the general bad character of Belle

Turner. She having testified as a witness in the case, it was competent to impeach her testimony by proof of general bad character.

For the error pointed out in refusing to allow the defendant to show the state of bad feeling of the father and mother of the witness, Otto Gordon, toward the defendant, the judgment must be reversed and the cause remanded.

Evidence Admissible as Bearing on the Credibility or Bias of a Witness.*

This subject is a large one, and its various subdivisions will be treated in a more or less brief form, so far as details are concerned, but the principles involved will be fully stated. Evidence of the want of chastity which affects the credibility of a witness will be found treated in the monographic note in 53 Am. St. Rep. 479-482, and will be omitted from this note. Similarly, no reference will be made to incriminating evidence, as this subject has been elaborately dealt with in an extended note in 75 Am. St. Rep. 318-347.

In General it may be said that the credibility of a witness may be attacked by the testimony of other witnesses that the facts about which he has testified are other than he has stated, or by proof that his reputation for truth and veracity is bad, or that his character is bad, or by proof that he has previously made contradictory or inconsistent statements, or by proof of his bias or hostility.

A person without memory is incompetent as a witness. Hence any evidence going to show that the mind and memory of the witness have become impaired by disease and are in a feeble condition, is competent to discredit his testimony: *Alleman v. Stepp*, 52 Iowa, 626, 35 Am. Rep. 288, 3 N. W. 636; *Isler v. Dewey*, 75 N. C. 466; *Rivara v. Ghio*, 3 Ill. D. Smith, 264; *McDowell v. Preston*, 26 Ga. 528. But in *Goodwyn v. Goodwyn*, 20 Ga. 600, it was held to be incompetent to impeach the memory of a witness in order to disparage his testimony. The court said that this could be done only by cross-examination. In *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026, while the court held that it was proper to show a witness' mental condition to affect his credibility, yet it held that it was improper to ask a witness on cross-examination whether he was not discharged from the army on the ground that he was periodically insane and generally imbecile, since this merely tended

***REFERENCES TO MONOGRAPHIC NOTES.**

Impeaching witnesses by proving want of chastity: 53 Am. St. Rep. 479-482.

Privilege of witnesses as to incriminating testimony: 75 Am. St. Rep. 318-347.

Impeaching witnesses: 73 Am. Dec. 762-777.

When a party may impeach his own witnesses: 74 Am. Dec. 398-400; 60 Am. Dec. 749-752.

Inquiry on collateral and irrelevant matters for the purpose of discrediting a witness: 53 Am. Dec. 321-324.

Dave v. State, 22 Ala. 23. Neither is it necessary that the impeaching witness should have heard some one say what a majority of his neighbors said or thought of him: *Dave v. State*, 22 Ala. 23. It is immaterial how many persons he has heard express themselves, the sole test being whether he knows the voice of the resident community: *State v. Turner*, 36 S. C. 534, 15 S. E. 602; *Dave v. State*, 22 Ala. 23. But he must have personal knowledge of the character or reputation of the impeached witness, and knowledge derived solely from inquiries of a few persons will not qualify him to testify: *Douglass v. Tousey*, 2 Wend. 352, 20 Am. Dec. 616; *Reid v. Reid*, 17 N. J. Eq. 101; *Curtis v. Fay*, 37 Barb. 64.

An impeaching witness may be cross-examined fully as to the extent and source of his knowledge respecting the general reputation of another witness: *Nelson v. State*, 32 Fla. 244, 13 South. 361; *Sorrelle v. Craig*, 9 Ala. 534; *State v. Howard*, 9 N. H. 485; *Bates v. Barber*, 4 Cush. 107; *State v. Miller*, 71 Mo. 89; *State v. Merri-man*, 34 S. C. 16, 12 S. E. 619; *State v. Meadows*, 18 W. Va. 658. The necessity for and the value of a rigid and extensive cross-examination is very clearly pointed out by Judge Cooley in *People v. Annis*, 13 Mich. 511. Where a witness states, on cross-examination, that the bad reputation of another witness for truth was founded on his not fulfilling his agreements, the testimony cannot be excluded: *Hapgood v. Fisher*, 34 Me. 407, 56 Am. Dec. 663.

There is some controversy as to whether an impeaching witness can be asked whether he would believe another witness under oath. The great weight of American authority favors the rule that such a question can be asked: *Ware v. State*, 36 Tex. Cr. Rep. 597, 38 S. W. 198; *Hamilton v. People*, 29 Mich. 173; *Knight v. House*, 29 Md. 194, 96 Am. Dec. 515; *Sorrelle v. Craig*, 9 Ala. 534; *Robinson v. State*, 16 Fla. 835; *Hudspeth v. State*, 50 Ark. 534, 9 S. W. 1; *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166; *Titus v. Ash*, 24 N. H. 319; *Stokes v. State*, 18 Ga. 17; *Massey v. Farmers' Nat. Bank*, 104 Ill. 827; *Lyman v. Philadelphia*, 56 Pa. St. 488; *State v. Johnson*, 40 Kan. 266, 19 Pac. 749; *Stevens v. Irwin*, 12 Cal. 306; *People v. Tyler*, 35 Cal. 553; *Wilson v. State*, 3 Wis. 798. The erroneous statement of Mr. Greenleaf to the contrary was pointed out in *Hamilton v. People*, 29 Mich. 173. One who testifies that he knows the general character of a witness, but nothing of his character for truth and veracity, may be asked whether, from his knowledge of such general character, he would believe the witness under oath: *Johnson v. People*, 3 Hill, 178, 38 Am. Dec. 624; *State v. Murphy*, 48 S. C. 1, 25 S. E. 43.

In *Holbert v. State*, 9 Tex. App. 219, 35 Am. Rep. 738, the court said that the proper inquiry was not whether the impeaching witness would believe him under oath, but whether, in view of his reputation, he is worthy of belief on oath. Such a refined distinction is not generally recognized, however. As has been seen,

before a witness can testify that he would not believe another under oath, he must first testify that he knows the latter's general reputation, and that such reputation is bad. See, in addition, *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898; *Benesch v. Waggner*, 12 Colo. 534, 13 Am. St. Rep. 254, 21 Pac. 706.

The authorities are few which seem to deny the right to ask an impeaching witness whether he would believe another under oath. Such a rule was announced in *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760, the court viewing an answer of this character as nothing more than the expression of a personal opinion of the witness. The same rule was seemingly adopted in *State v. Miles*, 15 Wash. 534, 46 Pac. 1047, where the court intimated that the weight of authority was against permitting witnesses to state whether from their knowledge of the general reputation of another they would believe him under oath.

There is a marked conflict of authority on the question as to whether, in proving character, the party is limited to the witness' character for truth and veracity, or whether he can show what his general moral character is. There is no doubt that his general reputation for truth and veracity may be shown, for this goes directly to discredit his testimony. And many of the cases, such as *State v. Burpee*, 65 Vt. 1, 36 Am. St. Rep. 775, 25 Atl. 964, go no further than to state that a witness' general reputation for truth and veracity may be proved. In a number of jurisdictions, however, the rule is well settled that, in proving the general reputation of a witness, the evidence should be limited to showing his reputation for truth and veracity, and that it is improper to allow inquiries relative to his general moral character: *Rudsdill v. Slingerland*, 18 Minn. 380; *People v. Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862; *State v. Randolph*, 24 Conn. 363; *Atwood v. Impson*, 20 N. J. Eq. 150; *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760; *Crane v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142; *Ayres v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657; *Dimick v. Downs*, 82 Ill. 570; *Smith v. State*, 58 Miss. 867; *Bakeman v. Rose*, 14 Wend. 110; *Quinsigamond Bank v. Hobbs*, 11 Gray, 250; *Ketchingman v. State*, 6 Wis. 426; *State v. Smith*, 7 Vt. 141. In *Rudsdill v. Slingerland*, 18 Minn. 380, it was said that the only object in inquiring into the character of a witness was for the purpose of ascertaining whether he was a truthful person or not. And for this reason inquiries concerning his general reputation should be confined to his reputation for truth and veracity.

In fully as many jurisdictions the rule is equally well established that you may not only inquire as to a witness' reputation for truth and veracity, but his general moral character may be shown. A witness' whole moral character may be attacked, and a party is not limited to showing his bad reputation for truth and veracity: *Gilliam v. State*, 1 Head, 38, 73 Am. Dec. 161; *State v. Shields*, 13 Me. 236, 53 Am. Dec. 147; *Mitchell v. State*, 94 Ala. 68, 10 South.

518; *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595; *Evans v. Smith*, 5 T. B. Mon. 363, 17 Am. Dec. 74; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506; *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344, 16 S. W. 286; *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748, 8 South. 142; *State v. May*, 142 Mo. 135, 43 S. W. 637; *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799; *People v. Prather*, 120 Cal. 660, 53 Pac. 259; *People v. Silva*, 121 Cal. 668, 54 Pac. 146.

In several of the states the rule has been established by statute that the credibility of a witness may be impeached by proof of his general moral character: *Kilburn v. Mullen*, 22 Iowa, 498; *State v. Froelick*, 70 Iowa, 213, 30 N. W. 487; *Morrison v. State*, 76 Ind. 335; *Majors v. State*, 29 Ark. 112; *Oline v. State*, 51 Ark. 140, 10 S. W. 225; *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799. In Utah, however, under a statute allowing the credibility of a witness to be drawn in question by evidence affecting his character "for truth, honesty, or integrity," it was held that the general reputation of a witness for honesty and integrity could not be attacked unless such reputation was in issue, and that for ordinary purposes of impeachment the inquiry must be limited to his general reputation for truth and veracity: *State v. Marks*, 16 Utah, 204, 51 Pac. 1089. Even in those jurisdictions where the general moral character of a witness may be inquired into, the inquiry cannot extend to show the cause producing the bad character: *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595. Hence where a defendant, who is an attorney, is cross-examined to show that he was disbarred, evidence as to the reasons for the disbarment is properly excluded: *People v. Dorthy*, 50 App. Div. 44; 63 N. Y. Supp. 592.

This would amount to an investigation as to particular acts of misconduct. And the authorities are quite uniform in holding that the character of a witness cannot be impeached by proof of particular acts of immorality or wrongdoing: *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Hart v. Reed*, 1 B. Mon. 166, 35 Am. Dec. 179; *Rhea v. State*, 100 Ala. 119, 14 South. 853; *Cline v. State*, 51 Ark. 140, 10 S. W. 225; *Johnson v. State*, 61 Ga. 305; *Gifford v. People*, 87 Ill. 210; *Griffith v. State*, 140 Ind. 163, 39 N. E. 440; *Evans v. Smith*, 5 T. B. Mon. 363, 17 Am. Dec. 74; *Allen v. Young*, 6 T. B. Mon. 136, 17 Am. Dec. 130; *Newcomb v. Griswold*, 24 N. Y. 298; *Real v. People*, 42 N. Y. 270; *State v. Rogers*, 108 Mo. 202, 18 S. W. 976; *State v. Garland*, 95 N. C. 671; *People v. Dorthy*, 156 N. Y. 237, 50 N. E. 800; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *Sweet v. Gilmore*, 52 S. C. 530, 30 S. E. 395; *Wike v. Lightner*, 11 Serg. & R. 198; *Leverich v. Frank*, 6 Or. 212. The reason for rejecting evidence of particular acts to impeach a witness is said to be that a witness is not prepared to explain or disprove, without notice, every particular act of his life, while he generally is in a position to sustain his general character or reputation: See

the cases cited above. It is not even competent to show that the witness has lied on other occasions: *Commonwealth v. Kenuon*, 130 Mass. 39.

The evidence of particular acts of immorality or misconduct which is to be excluded relates peculiarly to evidence given by third parties. The rule may or may not be the same as applied to the cross-examination of the witness himself. Indeed, it may be doubted whether any fixed rule is to be found relative to the extent of the cross-examination of a witness as to his own offenses. Undoubtedly, in some states, the same rule prevails here as when the evidence is elicited from a source other than the witness himself. Thus, in *Pyle v. Piercy*, 122 Cal. 383, 55 Pac. 141, it was held that a witness could not be impeached by cross-examination as to immoral conduct. So far as California is concerned, however, the rule seems to be settled by section 2051 of the Code of Civil Procedure, which prohibits proof of specific acts except conviction for crime of a certain character. Generally speaking, however, the extent of cross-examination of a witness to show his own misconduct for the purpose of discrediting him lies, to a large extent, in the discretion of the trial court. Questions of this character frequently do not directly impeach his character for truth and veracity. Their tendency is rather to degrade the witness and thus impeach him by injuring his character. The authorities are in no manner in harmony as to what may be asked of a witness upon his cross-examination, as to particular acts of misconduct which will degrade him. The most broad rule was laid down in *Carroll v. State*, 32 Tex. Cr. Rep. 431, 40 Am. St. Rep. 786, 24 S. W. 100, where it was held that a witness might, on cross-examination, be asked any question which tended to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character, and that he might be compelled to answer such a question, however irrelevant to the facts in issue, and however disgraceful to himself, except when the answer might expose him to a criminal charge. In *Real v. People*, 42 N. Y. 270, it was held that, upon cross-examination, a witness might be asked as to specific acts, the court saying that "upon a cross-examination of a witness, with a view of testing his credibility, inquiries are proper as to facts not competent to be proved in any other way." And in *Pennsylvania Ins. Co. v. Faies*, 13 Tex. Civ. App. 111, 35 S. W. 55, while it was recognized that the right to ask a witness degrading questions for the purpose of impeaching him has been greatly extended, especially in criminal cases, yet this right is confined to the cross-examination of the witness himself, and that traits of character or particular acts which simply degrade cannot be shown by a third party. Even as to the right to ask degrading questions of the witness himself on cross-examination, the authorities are in irreconcilable conflict. The formation of general rules on the subject

would seem to be out of the question. Perhaps the most that can be said is that in some jurisdictions a witness cannot be cross-examined as to matters which merely tend to degrade and whose only effect is to prejudice him in the estimation of the jury, but which do not affect his credibility: *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Yoe v. People*, 49 Ill. 410; *Marshall v. Morrissey*, 6 Ill. App. 542; *Russell v. Cruttenden*, 53 Conn. 564, 4 Atl. 267; *Derwin v. Parsons*, 52 Mich. 425, 50 Am. Rep. 262, 18 N. W. 200. Certainly, it is the exercise of a proper discretion for the trial court to exclude such questions: *Goins v. Moberly*, 127 Mo. 116, 29 S. W. 985. In *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128, the range and extent of such questions were said to be within the discretion of the trial judge. The same rule has been favored in other cases, the test seeming to be that where the questions are unjust to the witness and uncalled for by the circumstances of the case, and their sole tendency is to prejudice and not to impeach the character or credit of the witness, the trial court should exclude the testimony. But within these limits even irrelevant matters may be inquired about: *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496; *Turnpike Road Co. v. Loomis*, 82 N. Y. 127, 88 Am. Dec. 311; *People v. Oyer etc. Court*, 83 N. Y. 438. In other cases the rule has been announced that cross-examination for the purpose of disgracing the witness should not be permitted on an immaterial matter: *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340; *Vaughn v. Perine*, 8 N. J. L. 728, 4 Am. Dec. 411; *State v. Staples*, 47 N. H. 113, 90 Am. Dec. 565; *Ex parte Rowe*, 7 Cal. 184. But if the matter is material to the issue, the examination will be permitted, however disgraceful the answers may show the witness to be: *Clementine v. State*, 14 Mo. 112.

A few examples will serve to illustrate what questions have been allowed and what not in the cross-examination of a witness. Cross-examination as to criminal acts will be treated later. It has been held proper on cross-examination to ask a witness whether he had not combined with others to defraud an insurance company: *South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792; and whether he had not proposed to others to steal cattle and divide the profits: *People v. Turney* (Mich.), 83 N. W. 278. On the other hand, it has been held improper to cross-examine for the purpose of showing that the witness had deserted from the army: *Gulf etc. Ry. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151; or that he had been expelled from a church: *People v. Dorthy*, 20 App. Div. 308; 46 N. Y. Supp. 970; or that he had a loathsome disease: *Herod v. State* (Tex. Cr.), 56 S. W. 59; or that he was an insolvent debtor: *Smith v. Brockett*, 69 Conn. 492, 38 Atl. 57; or that the plaintiff was a chronic litigant: *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 221, 28 Am. St. Rep. 632, 30 N. E. 1001; or that the witness held office when a bad element was in power: *Kellogg v. McCabe*, 92 Tex.

199, 47 S. W. 520; or at what saloon he loafed and the amount he paid for his whisky: *Drye v. State* (Tex. Cr.), 55 S. W. 65; or as to matters relating wholly to one's personal affairs: *People v. Gotshall*, 123 Mich. 474, 82 N. W. 274; or that he would not work and was a street loafer and bum: *Houston etc. Ry. Co. v. White*, 23 Tex. Civ. App. 280, 56 S. W. 204; or by showing that the defendant had received a letter from a secret society which could be hired for murder or blackmail: *People v. Lee Dick Lung*, 129 Cal. 491, 62 Pac. 71. In one of the cases cited, *People v. Dorthy*, 20 App. Div. 308, 46 N. Y. Supp. 970, where examination was not allowed to show that the witness had been expelled from a church, the valid distinction was drawn that a witness might be cross-examined as to collateral acts of his own which tend to prove his moral degradation, but that he could not be compelled to testify as to the conclusions or decisions of others as to his moral degradation, except the conviction for crime or confinement in prison.

When the credibility of a witness is sought to be impeached by proof of his general reputation or character, the inquiry is usually confined to his reputation in the locality where he resides: *State v. Hilberg* (Utah), 61 Pac. 215; *Heath v. Scott*, 65 Cal. 548, 4 Pac. 557; *Rawles v. State*, 56 Ind. 433; *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27; *People v. Lyons*, 51 Mich. 215, 16 N. W. 380; or where he recently resided: *State v. Lanier*, 79 N. C. 622; *Gemmill v. State*, 16 Ind. App. 154, 43 N. E. 909; *Hank v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *Blackburn v. Mann*, 85 Ill. 222; *Pope v. Wright*, 116 Ind. 502, 19 N. E. 459; or if he has recently moved, his reputation in both places within a reasonable time may be shown: *Hamilton v. People*, 29 Mich. 173. Even if the witness has resided in a community but a few weeks, if he has actually acquired a reputation during that time, evidence of the fact is admissible: *State v. Cushenberry*, 157 Mo. 168, 56 S. W. 737. The neighborhood in which a witness resides is coextensive with his intercourse with his fellow-citizens, and may include an entire county: *Chess v. Chess*, 1 Penr. & W. 32, 21 Am. Dec. 350. Evidence as to the reputation of a witness in a town which was formerly his residence should generally be of reasonably recent date in order to be admissible. Hence, where he left his former town seven years before, evidence of his reputation was deemed improper, in the absence of any showing that he had not since maintained a residence elsewhere: *McGuire v. Kenefick*, 111 Iowa, 147, 82 N. W. 485. So evidence of reputation in a place of residence eighteen years before is properly excluded: *Shuster v. State*, 62 N. J. L. 521, 41 Atl. 701. But in *Brown v. Perez*, 89 Tex. 282, 34 S. W. 725, where the witness was shown not to have had a permanent residence for thirty years, his reputation in the community in which he lived thirty years before was held admissible for the purpose of discrediting him.

Similarly, when the reputation of a witness is sought to be proved,

this is to be established by evidence of his general reputation at the time of the trial, and not at a period remote from the commencement of the suit: *Smith v. Hine*, 179 Pa. St. 203, 36 Atl. 222; *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95. However, considerable latitude is allowed in this respect, and the time within which the inquiry should be confined is largely in the discretion of the trial court under the circumstances of each case. As was pointed out by the court in *Stratton v. State*, 45 Ind. 468, "if some latitude were not allowed, it would, in many cases, be impossible to impeach the most corrupt witness or sustain the most truthful one." Reputation two years before the trial has been held to be admissible: *Davis v. Commonwealth*, 95 Ky. 19, 44 Am. St. Rep. 201, 23 S. W. 585; *Norwood v. Andrews*, 71 Miss. 641, 16 South. 262. But in *Miller v. Miller*, 187 Pa. St. 572, 41 Atl. 277, a period four years before the trial was deemed too remote. Although a period of five years before the trial of a person of mature age, whose general character had been notoriously bad, was not considered too remote: *Rathbun v. Ross*, 46 Barb. 127; and bad character at a former place of residence eight years before the trial was admitted in *Watkins v. State*, 82 Ga. 231, 14 Am. St. Rep. 155, 8 S. E. 875. We have just seen that general reputation of a witness at his residence thirty years before might be shown where he had acquired no residence since that time: *Brown v. Perez*, 89 Tex. 282, 34 S. W. 725.

Impeaching testimony of this character will not be excluded because the knowledge of the witness as to his general reputation was acquired and is exclusively founded upon matters arising since the commencement of the action: *Fisher v. Conway*, 21 Kan. 18, 80 Am. Rep. 419. Indeed, a witness may generally be impeached by testimony as to his reputation up to the time the witness testifies, and the inquiry is not limited merely to the time of the commission of the act in respect to which he testifies: *Fossett v. State* (Tex. Cr.), 55 S. W. 497; *Dollner v. Lintz*, 84 N. Y. 669. This rule, however, applies to his reputation as a witness for truthfulness, and it does not apply to the general reputation of an accused acquired after the commission of the crime and which reputation is to be traced to and is acquired by the crime itself. In such a case, proof of reputation is limited to the time of the discovery of the offense: *State v. Sprague*, 64 N. J. L. 419, 45 Atl. 788.

Impeachment by Proof of Particular Crimes.—At common law, persons who had been convicted of infamous crimes were incompetent to be witnesses at all. In most, if not all, the states this disqualification is removed, and while the person is a competent witness, his conviction may be shown to affect his credibility: *People v. Dorthy*, 20 App. Div. 808; 46 N. Y. Supp. 970. Generally, as we have seen, specific acts of misconduct cannot be proved to affect credibility. But this rule is modified so far as convictions for certain

classes of crime are concerned, and the conviction may be shown: *Commonwealth v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875, 5 S. W. 527.

As to the class of crimes of which it may be proved a witness has been convicted, the authorities are not in harmony. This is due in part to the existence of statutes and in part to a difference of judicial opinion. For example, in California it is provided by statute that particular wrongful acts cannot be shown except conviction of a felony: Code Civ. Proc., sec. 1051; *People v. Silva*, 121 Cal. 668, 54 Pac. 146. In other states it is also proper to prove conviction of a felony: See *Keith v. State* (Tex. Cr.), 56 S. W. 628; *Keaton v. State* (Tex. Cr.), 57 S. W. 1125; *Pitner v. State*, 23 Tex. App. 366, 5 S. W. 210; *Hanners v. McClelland*, 74 Iowa, 318, 87 N. W. 889; *Leslie v. Commonwealth*, 19 Ky. L. Rep. 1201, 42 S. W. 1095.

Since conviction of an infamous crime disqualified one from being a witness at common law, it has been very generally held that conviction of such a crime may be shown to discredit a witness: *State v. Taylor*, 98 Mo. 240, 11 S. W. 570; *Coble v. State*, 31 Ohio St. 100; *Glenn v. Clore*, 42 Ind. 60; *State v. Dyer*, 139 Mo. 199, 40 S. W. 768; *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97; *Card v. Foot*, 57 Conn. 427, 18 Atl. 718; *Baltimore etc. Ry. Co. v. Rambo*, 59 Fed. 75. It has been held that in the absence of statute the only convictions which may be proved are convictions of offenses which at common law would have disqualified the person from testifying as a witness: *Coble v. State*, 31 Ohio St. 100; *Glenn v. Clore*, 42 Ind. 60. Petit larceny is considered an infamous crime and conviction of it may be shown: *State v. Dyer*, 139 Mo. 199, 40 S. W. 768; *Coleman v. State*, 94 Ga. 85, 21 S. E. 124. It is a matter of considerable difficulty to determine what crimes render the perpetrator infamous. But larceny is without doubt such a crime: *Shaw v. State*, 102 Ga. 660, 29 S. E. 477. But in Washington, petit larceny is not an infamous crime and proof of conviction for it cannot be shown to impeach a witness: *State v. Payne*, 6 Wash. 563, 34 Pac. 817. In other cases it has been said that the crime must be one which shows moral turpitude, or evidence of conviction of it cannot be shown: *Preston v. State* (Tex. Cr.), 53 S. W. 127; *Langhorne v. Commonwealth*, 76 Va. 1012.

The record of the conviction is the best evidence and should be introduced to prove the conviction: *Baltimore etc. Ry. Co. v. Rambo*, 59 Fed. 75; *Hall v. Brown*, 30 Conn. 551; *Johnson v. State*, 48 Ga. 116; *Kirby v. People*, 123 Ill. 436, 15 N. E. 83; *Newcomb v. Griswold*, 24 N. Y. 298; *Commonwealth v. Gorham*, 99 Mass. 420; *United States v. Biebusch*, 1 Fed. 213. And it has been held that this is the only way in which the conviction can be proved: *Hall v. Brown*, 30 Conn. 551; *Johnson v. State*, 48 Ga. 116; *Newcomb v. Griswold*, 24 N. Y. 298. Record of a conviction may be intro-

duced in evidence to discredit a witness, though he was afterward fully and legally pardoned: *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875, 5 S. W. 527; *Long v. State*, 23 Neb. 33, 36 N. W. 310.

While some of the cases above cited hold that the conviction of a witness can be shown only by the record itself, the weight of authority clearly sustains the right to show such conviction by cross-examination: *Keaton v. State* (Tex. Cr.), 57 S. W. 1125; *State v. Ekanger*, 8 N. Dak. 559, 80 N. W. 482; *Williams v. Commonwealth*, 21 Ky. L. Rep. 612, 52 S. W. 843; *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782; *Olemens v. Conrad*, 19 Mich. 170; *State v. Lawhorn*, 88 N. C. 634; *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *State v. Taylor*, 118 Mo. 153, 24 S. W. 449; *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406; *People v. Putman*, 129 Cal. 258, 61 Pac. 961; *Squiers v. State* (Fla.), 27 South. 864. In *Lewis v. Territory* (Ariz.), 60 Pac. 694, it was held that a defendant in a criminal case who took the stand in his own behalf could not be cross-examined as to other convictions. See, further, on the question of the cross-examination of a defendant in a criminal case, the monographic note in 75 Am. St. Rep. 318-347. In *Real v. People*, 42 N. Y. 270, the distinction seems to be drawn that while, perhaps, a witness cannot be cross-examined as to former convictions, he can be examined as to former crimes committed, and he may be asked whether he has been in jail or state prison. But in New York at the present time it seems that a witness may be cross-examined as to prior convictions: *People v. Dorthy*, 20 App. Div. 308; 46 N. Y. Supp. 970.

A distinction has been drawn in many of the cases between impeaching a witness by proof of particular facts tending to impair his credibility made independently of his examination, and proof of the same facts brought out upon his own cross-examination. The latter method is proper, and the former not. The cases must therefore be examined to ascertain whether the evidence was sought to be elicited upon cross-examination, or whether it was the testimony of a third party: See *Oxier v. United States*, 1 Ind. Ter. 85, 38 S. W. 331. Thus in *Texas Brew. Co. v. Dickey* (Tex. Civ. App.), 43 S. W. 577, it was held that evidence that a charge for embezzlement was pending against a witness, and that the grand jury had indicted him for theft, could not be admitted to affect his credibility, where it had not been drawn out on cross-examination. And one witness cannot be asked whether another was not a common thief: *McCutchen v. Loggins*, 109 Ala. 457, 19 South. 810. If a witness denies he committed a crime, he cannot be impeached by proof that he did do it: *Winn v. Winn* (Tex. Civ. App.), 57 S. W. 80.

A few examples will indicate what questions relative to the commission of crime have been held proper to ask. A witness may on cross-examination be asked whether he has been in state prison

or jail, and how much of his time he has passed in such places: *Real v. People*, 42 N. Y. 270; *Lights v. State*, 21 Tex. App. 308, 17 S. W. 428; *Darbyshire v. State*, 36 Tex. Cr. Rep. 547, 38 S. W. 173; *Smith v. State*, 64 Md. 25, 54 Am. Rep. 752, 20 Atl. 1026. And since it is always proper to ask a witness as to his place of residence, he may be required to answer, though his answer will show that he is in jail: *State v. Pugsley*, 75 Iowa, 742, 38 N. W. 498. He may also be asked as to his past places of residence and his associates, and it is no objection that the fact is brought out that he served a term in jail: *State v. Row*, 81 Iowa, 138, 46 N. W. 872. Conviction for petit larceny may be shown for the purpose of impeaching: *Carpenter v. Nixon*, 5 Hill, 260. The record of such conviction may be introduced after the witness has denied the conviction, although evidence that he had stolen would have been inadmissible: *State v. Wyse*, 33 S. C. 582, 12 S. E. 556. By statute, evidence of conviction for any crime may be made admissible to affect credibility: *Quigley v. Turner*, 150 Mass. 108, 22 N. E. 586. And this may include convictions for mere misdemeanors: *Helm v. State*, 67 Miss. 562, 7 South. 487. Generally, however, conviction for a mere misdemeanor cannot be shown: *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Taylor*, 98 Mo. 240, 11 S. W. 570; *State v. Smith*, 125 Mo. 2, 28 S. W. 181. Conviction under a city ordinance is such a minor offense that it cannot be shown to affect credibility: *State v. Taylor*, 98 Mo. 240, 11 S. W. 570; *Goode v. State*, 32 Tex. Cr. Rep. 505, 24 S. W. 102; *Coble v. State*, 31 Ohio St. 100; *Arhart v. Stark*, 27 N. Y. Supp. 301; 6 Misc. Rep. 579. The matter as to the grade of crime which may be shown in evidence to affect credibility is regulated by statute in many of the states. Thus in Nebraska the record of a conviction of an offense below the grade of a felony is inadmissible: *Young Men's Christian Assn. v. Rawlings*, 60 Neb. 377, 83 N. W. 175. In Texas such evidence is limited to crimes involving moral and legal turpitude: *Goode v. State*, 32 Tex. Cr. Rep. 505, 24 S. W. 102; *Williford v. State*, 36 Tex. Cr. Rep. 414, 37 S. W. 761. Though it seems that in a civil case a witness cannot be impeached by the record of his conviction of a felony in another state: *Missouri etc. Ry. Co. v. De Bord*, 21 Tex. Civ. App. 691, 53 S. W. 587. Conviction for liquor selling was held to have been properly proved under the circumstances arising in *State v. Slack*, 69 Vt. 486, 38 Atl. 811. The record showing conviction for assault and battery several years before was held to be admissible in *State v. Sauer*, 42 Minn. 258, 44 N. W. 115. A contrary rule is found in *Coble v. State*, 31 Ohio St. 100, and *State v. Huff*, 11 Nev. 17. In this last case it was held that "no legitimate inference of the untruthfulness of a witness can be drawn from the fact that he has been convicted of frequent assaults and batteries. It could be inferred that he was a violent tempered and perhaps a dangerous man, but not that he was a liar." Cross-examination as to prior convictions for assault and battery was held to be proper

In *People v. Irving*, 95 N. Y. 541, Judge Finch saying that: "If we are ever to roam through our Penal Code in search of a crime capable of being committed without indicating a defective moral character, we shall not select the one here in question." In *Coble v. State*, 81 Ohio St. 100, while on cross-examination it was said to be proper to ask whether the witness had been convicted of former assaults, yet the witness could not be compelled to answer the question. On the trial of an indictment for the unlawful sale of lottery tickets, it was held proper to cross-examine the defendant as to whether he had been engaged in the business of selling lottery tickets and had been previously convicted for violating the lottery law: *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128.

The authorities are equally conflicting as to whether a witness may be discredited by showing that he has been arrested or indicted. It would seem that the mere fact of arrest or even indictment amounted to nothing more than a mere charge or accusation against a person which may be wholly without foundation. And such questions, while they tend to prejudice a witness, have no bearing on his credibility. Not only is outside evidence that a witness has been arrested inadmissible: *State v. Howard*, 102 Mo. 142, 14 S. W. 937; *Pullen v. Pullen*, 43 N. J. Eq. 136, 6 Atl. 887; *State v. Grant*, 144 Mo. 56, 45 S. W. 1102; but a witness cannot be cross-examined as to arrests for other offenses: *Brewery Co. v. Bachman*, 18 N. Y. Supp. 138, 45 N. Y. St. Rep. 48; *People v. Crapo*, 70 N. Y. 288, 32 Am. Rep. 302; *People v. Irving*, 95 N. Y. 541; *Marx v. Hilsendegen*, 46 Mich. 836, 9 N. W. 439. In *People v. Irving*, 95 N. Y. 541, it was said that facts only could be inquired about, and not mere accusations, since the truth of a mere charge could not be assumed, and, therefore, did not tend to impeach the moral character of the witness.

In other jurisdictions, however, it has been determined that the credibility of a witness may be attacked by showing that he has been charged with the commission of an infamous crime, or that he has been arrested for a crime involving moral turpitude: *Jackson v. State*, 33 Tex. Cr. Rep. 281, 47 Am. St. Rep. 30, 26 S. W. 194, 622; *Carroll v. State*, 32 Tex. Cr. Rep. 431, 40 Am. St. Rep. 786, 24 S. W. 100. An accused may be cross-examined as to arrests for crimes similar to the one for which he is being tried: *People v. Larsen*, 10 Utah, 143, 37 Pac. 258. In *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221, it was held proper to cross-examine a witness as to any serious charge brought against him. The extent of cross-examination as to former arrests is frequently said to rest largely in the discretion of the trial court: *Hanoff v. State*, 87 Ohio St. 178, 41 Am. Rep. 496. This discretion was held to have been properly exercised where a witness was asked whether he had been arrested for vagrancy, drunkenness, and other misdemeanors: *Hill v. State*, 42 Neb. 503, 60 N. W. 916.

The rule is the same as applied to indictments. Some jurisdictions consider an indictment nothing more than a mere accusation, the truth of which cannot be assumed, hence it does not tend to impeach his character: *Van Bokkelen v. Berdell*, 130 N. Y. 141, 29 N. E. 254; *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302; *People v. Irving*, 95 N. Y. 541; *Willson v. Eveline*, 35 App. Div. 92; 54 N. Y. Supp. 514; *Burroughs v. Strauss*, 48 App. Div. 584; 62 N. Y. Supp. 1119. An indictment which has been non prossed cannot be admitted to impeach a witness: *State v. Conway*, 20 R. L. 270, 38 Atl. 656. In other jurisdictions a witness may be impeached by showing that he has been indicted for a felony or for an infamous crime: *Cannon v. State (Tex. Cr.)*, 56 S. W. 351; *Whitley v. State (Tex. Cr.)*, 56 S. W. 69. Theft is a crime showing moral turpitude, and hence a witness may be asked on cross-examination whether he has been indicted for such an offense: *Whitley v. State (Tex. Cr.)*, 56 S. W. 69; *Carroll v. State*, 32 Tex. Cr. Rep. 431, 40 Am. St. Rep. 786, 24 S. W. 100; *Warren v. State*, 33 Tex. Cr. Rep. 502, 26 S. W. 1082; *Roberts v. Commonwealth*, 14 Ky. L. Rep. 219, 20 S. W. 267. But in *Kruger v. Spachek*, 22 Tex. Civ. App. 307, 54 S. W. 295, it was held that in a civil action a witness could not be asked on cross-examination if he had been indicted for theft. But in any case, in Texas, a witness cannot be cross-examined as to indictments against him for misdemeanors which do not impute moral turpitude: *Brittain v. State*, 36 Tex. Cr. Rep. 406, 37 S. W. 758; *Lewis v. Bell (Tex.)*, 40 S. W. 747. A witness may be impeached by proof that he is under indictment for perjury: *Bratt v. State (Tex. Cr.)*, 41 S. W. 624. In Utah it would seem to be proper to ask a witness on cross-examination concerning any indictment or charge against him for any crime: *People v. Hite*, 8 Utah, 461, 33 Pac. 254.

Impeachment by Proof of Prior Contradictory Statements.—One of the most frequent methods of discrediting the testimony of a witness is to show that he has made prior statements which are inconsistent with or which contradict his testimony at the trial: *McDaniel v. Baca*, 2 Cal. 326, 56 Am. Dec. 339; *Allen etc. Co. v. Harrison*, 80 Vt. 219, 73 Am. Dec. 302; *Gould v. Norfolk Lead Co.*, 9 Cush. 338, 57 Am. Dec. 50; *People v. Tice*, 115 Mich. 219, 69 Am. St. Rep. 560, 73 N. W. 108; *State v. Burns*, 148 Mo. 167, 71 Am. St. Rep. 588, 49 S. W. 1005; *Carroll v. State*, 74 Miss. 688, 60 Am. St. Rep. 539, 22 South. 295; *Otterson v. Hofford*, 36 N. J. L. 129, 13 Am. Rep. 429; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783; *Billings v. State*, 52 Ark. 303, 12 S. W. 574; *Cotton v. State*, 87 Ala. 75, 6 South. 396; *Allen v. State*, 87 Ala. 107, 6 South. 370; *Leahey v. Cass Ave. etc. Ry. Co.*, 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58; *Johnston Harvester Co. v. Miller*, 72 Mich. 265, 16 Am. St. Rep. 536, 40 N. W. 429; *State v. Rudd*, 97 Iowa, 389, 66 N. W. 748; *Smith*

v. Thomas, 121 Cal. 533, 54 Pac. 71; *Morris v. Guffey*, 188 Pa. St. 534, 41 Atl. 731; *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 618; *State v. Grant*, 144 Mo. 56, 45 S. W. 1102; *Townsend v. Felthousen*, 156 N. Y. 618, 51 N. E. 279; *Thornton v. Savage*, 120 Ala. 449, 25 South. 27. It is needless to cite further cases upon a point universally recognized. The contradictory statements of a witness for the defendant in a criminal case may be shown, although they tend to prove the guilt of the defendant: *Ficken v. State*, 97 Ga. 813, 25 S. E. 925. It is not necessary that the party, whose witness it is sought to impeach, should be present when the contradictory statements were made, since the purpose of showing such statements is not to blind the party but to impeach the witness: *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190. Contradictory statements are admissible solely to impeach the witness, and for no other purpose: *Hudspeth v. Tyler* (Ky.), 56 S. W. 973. Dying declarations may be contradicted in the same manner as the statement of any witness, by showing statements made by the deceased in apparent contradiction to those declarations: *Carver v. United States*, 164 U. S. 694, 17 Sup. Ct. Rep. 228.

Before a witness can be impeached by proof of contradictory statements, a proper foundation must be laid for the introduction of such testimony: *Leahey v. Cass Ave. etc. Ry. Co.*, 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58; *Hammond v. Dike*, 42 Minn. 273, 18 Am. St. Rep. 503, 44 N. W. 61; *State v. Watson*, 102 Iowa, 651, 72 N. W. 283; *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059; *St. Louis etc. Packet Co. v. McPeters*, 124 Ala. 451, 27 South. 518; *Henson v. State*, 120 Ala. 816, 25 South. 23; *Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416; *Connell v. McNett*, 109 Mich. 323, 67 N. W. 344; *State v. Hughes*, 8 S. Dak. 338, 66 N. W. 1076; *Mason v. Southern Ry.*, 58 S. C. 70, 79 Am. St. Rep. 826, 36 S. E. 440; *Birch v. Hale*, 99 Cal. 299, 33 Pac. 1088; *People v. Nouella*, 99 Cal. 333, 33 Pac. 1097; *Young v. Brady*, 94 Cal. 128, 29 Pac. 489; *State v. Scott*, 48 La. Ann. 1418, 20 South. 909; *State v. Conerly*, 48 La. Ann. 1561, 21 South. 192; *Quincy Horse Ry. Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190; *Watson v. St. Paul City Ry. Co.*, 42 Minn. 46, 43 N. W. 904; *Hammond v. Dike*, 42 Minn. 273, 18 Am. St. Rep. 503, 44 N. W. 61; *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Sutton v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 466.

And while a foundation must be laid, it is not necessary to warn the witness and notify him of your intention to contradict him for the purpose of impeachment: *State v. Henderson*, 52 S. C. 470, 30 S. E. 477.

To properly lay a foundation for proving contradictory statements, the attention of the witness should be called to the fact, and he should be interrogated with direct reference to it: *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 406. It has frequently been said

that the attention of the witness should be directed to the precise "time, place, and person" involved in the contradiction, and that it is not sufficient to ask the witness generally whether he had made a particular statement: *Moore v. Bettis*, 11 Humph. 67, 53 Am. Dec. 771; *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687; *Smith v. Cooke*, 81 Md. 174, 100 Am. Dec. 58; *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 828; *State v. Marler*, 2 Ala. 43, 36 Am. Dec. 398; *State v. Patterson*, 2 Ired. 346, 38 Am. Dec. 699; *McIntire v. Young*, 6 Blackf. 496, 39 Am. Dec. 443; *Whiteford v. Burckmyer*, 1 Gill, 127, 39 Am. Dec. 640; *Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641; *Quincy Horse Ry. Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190; *Birch v. Hale*, 99 Cal. 299, 33 Pac. 1088; *Mahaney v. St. Louis etc. Ry. Co.*, 108 Mo. 191, 18 S. W. 895; *Hanscom v. Burmood*, 35 Neb. 504, 58 N. W. 371.

The purpose in requiring that the witness should be asked specifically concerning prior inconsistent or contradictory statements is that the witness may have an opportunity of explaining what might otherwise seem contradictory: *Franklin Bank v. Pennsylvania etc. Nav. Co.*, 11 Gill & J. 28, 33 Am. Dec. 687; *Esterly v. Eppelsheimer*, 73 Iowa, 260, 34 N. W. 846; *Zimmerman v. Kearney Co. Bank*, 59 Neb. 23, 80 N. W. 54. For it might be possible for the witness to admit the conversation or statements, and still make them harmonize with his present testimony: *State v. Marler*, 2 Ala. 43, 36 Am. Dec. 398; *McIntire v. Young*, 6 Blackf. 496, 39 Am. Dec. 443.

It is sufficient to direct the attention of the witness with reasonable certainty to the subject of prior inconsistent declarations. It is immaterial that there is a slight difference between the date to which his attention was directed and that at which the contradictory statement is shown to have been made: *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442. It is not sufficient to direct the witness' attention to the place, date, and persons involved, but he must be asked whether he said that which is intended to be proved: *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666. If the time at which the conversation took place is approximately fixed, this is sufficient, especially if the witness is able to identify the circumstance: *Kirshbaum v. Hanover Fire Ins. Co.*, 16 Ind. App. 606, 45 N. E. 1113. And the precise place in a small hamlet where the conversation occurred need not be pointed out, if the witness admits the meeting: *State v. Welch*, 33 Or. 33, 54 Pac. 213. Neither is it necessary to name all the persons who were present at the conversation: *State v. Bartmess*, 33 Or. 110, 54 Pac. 167; *Plass v. Plass*, 122 Cal. 3, 54 Pac. 372. Designating the time of the conversation as the summer of a certain year is sufficiently definite: *Ashton v. Ashton*, 11 S. Dak. 610, 79 N. W. 1001.

If the witness sought to be impeached is a party to the suit, no foundation need be laid before his contradictory statements can be shown, since such statements are admissions of a party against his

interest which are admissible in any event: *Sanders v. Clifford*, 71 Mo. App. 548; *Owens v. Kansas City etc. R. R. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350; *Klug v. State*, 77 Ga. 734; *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493; *Collins v. Mack*, 31 Ark. 684; *Kennedy v. Wood*, 52 Hun, 46; *Wilson v. Wilson*, 137 Pa. St. 260, 20 Atl. 644. The "next friend" of a minor is not such a party to the action that his contradictory statements can be shown without laying a foundation therefor: *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208. In Iowa, however, where the sole purpose of introducing the contradictory statements is to impeach the party to the suit, a proper foundation must be laid the same as in the case of any other witness: *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340; *Conway v. Nicol*, 34 Iowa, 533.

In some few states, notably Massachusetts, no foundation is required to be laid for the impeachment of a witness: *Gould v. Norfolk Lead Co.*, 9 Cush. 388, 57 Am. Dec. 50; *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; *Carville v. Westford*, 163 Mass. 544, 40 N. E. 893; *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 618. In Vermont, a witness whose testimony is given by deposition may be impeached by proof of inconsistent declarations, without having his attention first called to them: *Billings v. Metropolitan Ins. Co.*, 70 Vt. 477, 41 Atl. 516. In Pennsylvania and Connecticut, it seems to be settled that whether a witness may be contradicted without having been first given an opportunity to explain the evidence which is relied on for that purpose, is a question which is left to the discretion of the trial courts: *Sharp v. Emmet*, 5 Whart. 288, 34 Am. Dec. 554; *Hedge v. Clapp*, 22 Conn. 262, 58 Am. Dec. 424; *Walden v. Finch*, 70 Pa. St. 460; *Cronkrite v. Trexler*, 187 Pa. St. 100, 41 Atl. 22. In Massachusetts, a party cannot contradict his own witnesses by proof of prior inconsistent statements without laying a foundation therefor. This rule is established by statute: *Batchelder v. Batchelder*, 139 Mass. 1, 29 N. E. 61; *Wilton v. Humphreys*, 176 Mass. 253, 57 N. E. 374. In *Lewis v. Topman*, 90 Md. 294, 45 Atl. 459, where a witness was not asked in regard to a letter written by him before it was read in evidence, this was held to be no error, where he was recalled and full opportunity was given him to inspect and testify respecting the letter.

Not only may a witness' inconsistent statements be proven, but his inconsistent acts and conduct may be shown also: *Omaha etc. Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185, 21 Pac. 925; *Whitney v. Butts*, 91 Ga. 124, 16 S. E. 649; *State v. Lurch*, 12 Or. 104, 6 Pac. 411. The witness may be cross-examined concerning his inconsistent conduct: *Yeaw v. Williams*, 15 R. I. 20, 23 Atl. 33; *Miller v. Baker*, 160 Pa. St. 172, 28 Atl. 648; *Hyland v. Milner*, 99 Ind. 308.

To impeach a witness by proof of contradictory statements, they must be material to the issue: *Burney v. Torrey*, 100 Ala. 157, 46

Am. St. Rep. 33, 14 South. 685; Jones v. Malvern Lumber Co., 58 Ark. 125, 23 S. W. 679; Torris v. People, 19 Colo. 438, 36 Pac. 153; Bottom v. Barton, 12 Colo. App. 53, 54 Pac. 1031; Futch v. State, 90 Ga. 472, 16 S. E. 102; Elkhart v. Witman, 122 Ind. 538, 23 N. E. 796; State v. Blakesley, 43 Kan. 250, 23 Pac. 570; State v. Benner, 64 Me. 267; Commonwealth v. Jones, 155 Mass. 170, 29 N. E. 467; Paddock v. Kappahan, 41 Minn. 528, 43 N. W. 393; Harper v. Indianapolis etc. R. R. Co., 47 Mo. 567, 4 Am. Rep. 353; Williams v. State, 73 Miss. 820, 19 South. 826; Morris v. Atlantic Ave. R. R. Co., 116 N. Y. 552, 22 N. E. 1097; McDuffie v. Bentley, 27 Neb. 380, 43 N. W. 123; Hill v. State, 91 Tenn. 521, 19 S. W. 674; Johnson v. State, 27 Tex. App. 163, 11 S. W. 106; People v. Tilley, 84 Cal. 651, 24 Pac. 290. The prior contradictory statements which are sought to be introduced to impeach must also be a statement of facts and not a mere opinion of the witness: McFadin v. Catron, 120 Mo. 252, 25 S. W. 506; Schell v. Plumb, 55 N. Y. 592; Sweeney v. Kansas City Cable Ry. Co., 150 Mo. 385, 51 S. W. 682; City Bank v. Young, 43 N. H. 457; Commonwealth v. Mooney, 110 Mass. 99. Suspicions are nothing more than opinions and cannot be shown to contradict: People v. Stackhouse, 49 Mich. 76, 13 N. W. 364. Hence, the prior statement of a witness out of court that another than the defendant committed the crime is inadmissible: Orr v. State, 107 Ala. 85, 18 South. 142. A previously expressed opinion not based upon facts cannot be shown: People v. Foglesong, 116 Mich. 556, 74 N. W. 730. An attorney cannot be impeached by showing statements made by him in the argument of a case before a jury. Statements under such circumstances are based upon the evidence before the court and do not represent his individual statement of facts. They are more in the nature of opinions based upon the testimony of others: Becker v. Cain, 8 N. Dak. 615, 80 N. W. 805. Mere conclusions as to the merits of a case cannot be shown to contradict and impeach a witness: Ross v. Commonwealth, 21 Ky. L. Rep. 1344, 55 S. W. 4. See, further, Lane v. Bryant, 9 Gray, 245, 69 Am. Dec. 282. Where opinion evidence is proper evidence under any circumstances, as in the case of expert testimony, a prior contradictory opinion of the witness may be proved for the purpose of impeaching him: Sanderson v. Nashua, 44 N. H. 492; Dalton's Appeal, 59 Mich. 352, 26 N. W. 539.

The prior statements, in order to be admissible, must be contradictory to his testimony at the trial: People v. Collum, 122 Cal. 186, 54 Pac. 589; State v. Fogarty, 105 Iowa, 32, 74 N. W. 754. At least the statements must be inconsistent with his testimony: State v. Patterson, 2 Ired. 346, 38 Am. Dec. 699; Hall v. Young, 87 N. H. 134; Pedigo v. Commonwealth, 19 Ky. L. Rep. 1723, 44 S. W. 143. But where the inconsistency does not appear by a direct comparison with his testimony, but only inferentially, the prior statements are not admissible: People v. Collum, 122 Cal.

186, 54 Pac. 589. The degree of contradiction seems not to be material, if there is a contradiction in any material particular: *Tinklepaugh v. Rounds*, 24 Minn. 298; *Elmer v. Fessenden*, 154 Mass. 427, 28 N. E. 299; *Seller v. Jenkins*, 97 Ind. 430. The fact that a witness states at the trial something in addition to what he stated at the coroner's inquest will not permit his testimony at such inquest to be shown, where the two statements are not in conflict with each other: *State v. Robinson*, 52 La. Ann. 616, 27 South. 124. A witness who testifies that he was not present at the time a crime was committed cannot be contradicted by a prior narration as to the circumstances of the occurrence: *Taylor v. State*, 38 Tex. Cr. Rep. 552, 43 S. W. 1019. A witness cannot be contradicted by proof of a conversation different from the one about which the witness was asked: *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577. Hence, where a witness is asked as to a testator's mental condition at the time he made the will, he cannot be contradicted by statements made as to the testator's condition before or after the execution of the will: *Estate of O'Connor*, 118 Cal. 69, 50 Pac. 4. While the question put to an impeaching witness need not be confined to the exact words of the question asked of the impeached witness, yet the words should be identical as to time, place, and substance, and the question should be so framed as to admit of an affirmative or negative answer: *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948.

A witness cannot be impeached by an involuntary confession, either of himself or of one of his own witnesses: *State v. Steeves*, 29 Or. 85, 43 Pac. 947; *Morales v. State*, 36 Tex. Cr. Rep. 234, 36 S. W. 435, 846. Before the confession of a defendant in a criminal case can be admitted to contradict him, where such confession was made while he was in custody, it must be shown that he was properly warned as to the consequences of his admission. This is the statutory rule in Texas: *Morales v. State*, 36 Tex. Cr. Rep. 234, 36 S. W. 435, 846.

A foundation for showing contradictory statements cannot be laid on cross-examination concerning a matter which the witness had not testified to in his direct examination. Such new affirmative matter brought out on cross-examination has the effect of making the witness the witness of the cross-examining party, and he cannot contradict him: *Woodward v. State* (Tex. Cr.), 58 S. W. 135; *Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751; *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889; *Red v. State*, 39 Tex. Cr. Rep. 414, 46 S. W. 408. That the witness cannot even be cross-examined concerning such matters, see *Red v. State*, 39 Tex. Cr. Rep. 414, 46 S. W. 408. In Montana, it appears to be proper upon cross-examination to lay a foundation for the impeachment of a witness as to a matter not germane to his direct testimony: *State v. Hurst*, 23 Mont. 484, 59 Pac. 911.

Only such parts of a witness' former statements are admissible as are at variance with his testimony: *State v. Reinheimer*, 100 Iowa, 624, 80 N. W. 669. Evidence as to the contradictory statements should be confined to the conversation to which the denial related, and to the precise point of the denial: *Peterson v. State*, 83 Md. 194, 34 Atl. 834. Hence, it is improper to cross-examine as to an entire prior conversation, most of which is hearsay, and which had no relation to the witness' testimony at the trial, and which contained matters wholly irrelevant and immaterial: *People v. Cole*, 127 Cal. 545, 59 Pac. 984. And a deposition which has been previously taken cannot be read entire, but only those portions which contradict the witness are admissible: *People v. Lambert*, 120 Cal. 170, 52 Pac. 307; *Stephens v. People*, 19 N. Y. 549; *Hammond v. Dike*, 42 Minn. 273, 18 Am. St. Rep. 503, 44 N. W. 61.

In a few cases the rule seems to be declared that unless a witness denies having made the contradictory statements, such statements cannot be proved; and if the witness simply states that he has no recollection of having made the statements, this is not a sufficient denial such as will admit evidence to prove that he did make the statements: See *Wiggins v. Holman*, 5 Ind. 503; *McVey v. Blair*, 7 Ind. 590; *Robinson v. Pitzer*, 3 W. Va. 335. See *Reizenstein v. Clark*, 104 Iowa, 287, 73 N. W. 588. There is no question that the contradictory statements may be shown if the witness testifies positively that he did not make them: *Moeller v. Karhoff*, 98 Iowa, 726, 68 N. W. 446; *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616. Undoubtedly, the great weight of authority supports the rule that a witness may be impeached by proof of prior contradictory statements, where he merely testifies that he does not remember, or has no recollection of, making the statements referred to: *Kelly v. Cohoes Knitting Co.*, 8 App. Div. 156; 40 N. Y. Supp. 477; *Pringle v. Miller*, 111 Mich. 663, 70 N. W. 345; *Levy v. State*, 28 Tex. App. 203, 19 Am. St. Rep. 826, 12 S. W. 596; *Turner v. State (Tex. Cr.)*, 51 S. W. 366. Where the witness does not deny the prior statements, but admits such facts as amount to a denial, the contradictory statements may be shown: *State v. Sanders*, 52 S. C. 580, 30 S. E. 616. It is only when the witness fails to remember an immaterial and irrelevant conversation that he cannot be contradicted by the proof of such conversation: *People v. Dice*, 120 Cal. 189, 52 Pac. 477. The rule is very generally recognized that unless the witness admits that he made the contradictory statements, they may be proved for the purpose of impeaching him: *Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641; *Consolidated etc. Co. v. Keifer*, 134 Ill. 481, 23 Am. St. Rep. 688, 25 N. E. 799; *Payne v. State*, 60 Ala. 80; *Nute v. Nute*, 41 N. H. 60; *Gregg Township v. Jamison*, 55 Pa. St. 468; *Heddles v. Chicago etc. Ry. Co.*, 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115. If the witness admits that he made the contradictory state-

ments, there is no necessity for proving them, and they are, therefore, not admissible in evidence: *Swift v. Madden*, 165 Ill. 41, 45 N. E. 979; *Lightfoot v. People*, 16 Mich. 507; *Rodriguez v. State*, 23 Tex. App. 503, 5 S. W. 255. But if the witness neither admits nor denies his former statements, and says that he probably did make them, proof of such statements is admissible: *Wyatt v. State*, 38 Tex. Cr. Rep. 256, 42 S. W. 598.

Contradicting by Previous Testimony, Depositions, or Writings.—The evidence of a witness taken at a previous trial upon his examination may be used to contradict his subsequent evidence: *Klotz v. James*, 96 Iowa, 1, 59 Am. St. Rep. 348, 64 N. W. 648; *Henry v. Sioux City etc. Ry. Co.*, 75 Iowa, 84, 9 Am. St. Rep. 457, 39 N. W. 193; *Sayles v. Fitzgerald*, 72 Conn. 391, 44 Atl. 733; *Gates v. Gil-mour*, 86 Ill. App. 215; *Floyd v. State*, 82 Ala. 16, 2 South. 683; *Brown v. State*, 76 Ga. 623; *Kreibohm v. Yancey*, 154 Mo. 67, 55 S. W. 260; *Bennett v. Syndicate Ins. Co.*, 43 Minn. 45, 44 N. W. 794; *Elmer v. Fessenden*, 154 Mass. 427, 28 N. E. 299.

The testimony of a party to the action given at a former trial may be proved without laying a foundation: *State v. Forsythe*, 99 Iowa, 1, 68 N. W. 446.

A witness may be contradicted by his testimony given at the coroner's inquest: *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; *Jones v. State*, 120 Ala. 303, 25 South. 204. If the testimony before the coroner has been reduced to writing as required by law, the contradictory statements should be proved by such evidence: *Oole v. State*, 59 Ark. 50, 26 S. W. 377. The testimony of a witness given at a preliminary examination is admissible to contradict and impeach such witness: *Jackson v. State*, 38 Tex. Cr. Rep. 281, 47 Am. St. Rep. 30, 26 S. W. 194, 622. A witness may be impeached by showing contradictory statements made by him before the grand jury: *Commonwealth v. Chance*, 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551; *Tooney v. People*, 81 Ill. App. 370; *Hines v. State*, 37 Tex. Cr. Rep. 339, 39 S. W. 935. The Texas statute prohibiting a witness from divulging proceedings in the grand jury room unless "required to testify to any of such matters before a judicial tribunal" limits the testimony to cases where the same matter is under investigation both in the grand jury room and in the trial court. Hence, as to matters not germane to the investigation in the trial court, a witness cannot be impeached by showing that he made contradictory statements before the grand jury: *Hines v. State*, 37 Tex. Cr. Rep. 339, 39 S. W. 935. Testimony given in an examination by customs officers is admissible to impeach subsequent testimony, if in conflict therewith: *In re Wong Sing*, 83 Fed. 147. A witness may be impeached by proof of contradictory statements made by him in another action in which he was a party: *Donaldson v. Alexander*, 29 Misc. Rep. 856; 60 N. Y. Supp. 463; *Graham v. Myers*, 67 Mich. 277, 34 N. W. 710. In fact, testimony given in any case upon the precise point is admissible

to impeach, if it contradicts the present testimony of the witness: See *Sherard v. Richmond etc. R. R. Co.*, 35 S. O. 467, 14 S. E. 953.

Former testimony or depositions which have been reduced to writing and subscribed by the witness are admissible to impeach a witness: *Kennedy v. State*, 85 Ala. 326, 5 South. 300; *Carden v. State*, 84 Ala. 417, 4 South. 823; *Stephens v. People*, 19 N. Y. 549; *People v. Devine*, 44 Cal. 452; *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481, 23 Am. St. Rep. 688, 25 N. E. 799; *Draper v. Taylor*, 58 Neb. 787, 79 N. W. 709. An entire deposition may be read if necessary to explain or throw light upon the contradictory statements relied upon: *Jackson v. State*, 33 Tex. Cr. Rep. 281, 47 Am. St. Rep. 80, 26 S. W. 194, 622. A witness cannot be impeached by garbled extracts from a deposition without having an opportunity to hear read the entire deposition: *Kennedy v. State*, 85 Ala. 326, 5 South. 300.

The former testimony of a witness may be proved by any competent witness who heard and recollects it: *Brown v. State*, 76 Ga. 623; *State v. McDonald*, 65 Me. 466. The minutes of the evidence given by witnesses at a preliminary examination cannot be introduced for purposes of impeachment: *State v. Adams*, 78 Iowa, 292, 43 N. W. 194. The same is true of minutes of evidence given before a grand jury: *State v. Hayden*, 45 Iowa, 11. In this last case the court in considering the question said: "The minutes of a witness' testimony before a grand jury, and the substance of his testimony taken before an examining magistrate, are in no proper sense the writing or the act of the witness. It is the duty of the clerk of the grand jury to take and preserve the minutes of the proceedings, and of the evidence given before it. The witness is in no way connected with the act of taking these minutes of his testimony; they are not required to be read over to him, nor to be signed by him. Unlike a deposition or affidavit, they do not purport to give statements of fact in full, but are what the law requires, mere 'minutes.' They are often taken down by persons wholly inexperienced in reducing the language of others to writing. . . . The evidence taken before grand juries is often of the most indefinite and uncertain character, and if used as the means of impeaching witnesses, would lead to the grossest injustice to witnesses, and tend to defeat a proper administration of justice." To the same effect, see *Payne v. State*, 66 Ark. 545, 52 S. W. 276; *Price v. State (Tex.)*, 43 S. W. 96. But in *Brown v. State*, 76 Ga. 623, the notes or memoranda of the evidence taken by the court was admitted to be competent evidence to impeach a witness. And where the testimony of the witness was taken down in writing, read over to the witness and signed by him, the written memorandum was held admissible in evidence, and its use could not be limited merely to refreshing the memory of the witness who wrote it: *Stephens v. People*, 19 N. Y. 549. And in *Cole v.*

State, 59 Ark. 50, 26 S. W. 377, where the testimony before a coroner was required by law to be reduced to writing, such written statement was deemed the best evidence of such testimony. In *Phares v. Barber*, 61 Ill. 271, a transcribed phonographic report of the evidence of a witness on a former trial was held inadmissible to contradict the witness in a subsequent trial, since the legislature had not declared that such reports should be evidence for any purpose. If the written statement of the testimony of a witness given at a preliminary examination is not read to him and signed by him, it is inadmissible to impeach: *Nelms v. State*, 13 Smedes & M. 500, 53 Am. Dec. 94. A bill of exceptions taken in a former trial and containing the testimony then given by a witness was held inadmissible to contradict him, in *Pennsylvania Co. v. Marion*, 123 Ind. 415, 18 Am. St. Rep. 330, 23 N. E. 973. A certified copy of the transcript of the reporter's notes containing the testimony of a witness at a former trial was held inadmissible to impeach such witness in *Redford v. Spokane St. Ry. Co.*, 15 Wash. 419, 46 Pac. 650. Transcript of the testimony given at a former trial was held admissible to show what the witness had said at that time in *Oullison v. Lindsay*, 108 Iowa, 124, 78 N. W. 847. The entire judgment-roll is not admissible, however, where it embraces a large amount of foreign and irrelevant matter: *Donaldson v. Alexander*, 29 Misc. Rep. 356; 60 N. Y. Supp. 463.

A petition for a new trial is admissible to contradict the statements of a witness: *Bellows v. Sowles*, 59 Vt. 63, 7 Atl. 542. The admission of a party that he had intentionally sworn falsely to an affidavit used upon motion for a new trial may be shown to impeach: *Georgia R. R. etc. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 794.

Verified pleadings are admissible to contradict the testimony of a witness: *Smith v. Traders' Nat. Bank*, 74 Tex. 457, 12 S. W. 113; *Floyd v. Thomas*, 108 N. C. 93, 12 S. E. 74. Even a verified pleading in another suit may be introduced for the purpose of impeachment after a proper foundation has been laid: *Williams v. Miller*, 6 Kan. App. 626, 49 Pac. 703. But it cannot be introduced as part of the cross-examination of a witness for such purpose: *Williams v. Miller*, 6 Kan. App. 626, 49 Pac. 703. The fact that a pleading has been superseded by an amended one is no reason for rejecting the original pleading when it is properly offered for purposes of impeachment: *Barrett v. Featherstone*, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245; *Estate of O'Connor*, 118 Cal. 69, 50 Pac. 4. An unverified pleading signed alone by the party's attorney, without proof that he had any notice of its contents, is not admissible to contradict his testimony to the contrary on the trial of another case: *Solari v. Snow*, 101 Cal. 387, 35 Pac. 1004. A prosecuting witness may be contradicted by statements made by him in a sworn complaint: *Commonwealth v. Snee*, 145 Mass. 351, 14 N. E. 157. Parol evidence of the contents of a complaint in an-

other action is incompetent to impeach the testimony of a witness: *Beyer v. Consolidated Gas Co.*, 44 App. Div. 158; 60 N. Y. Supp. 628.

Letters written by a witness and containing statements inconsistent with his testimony, are competent for the purpose of discrediting him: *Bacot v. Hazlehurst Lumber Co.* (Miss.), 23 South. 481; *Sharp v. Hall*, 86 Ala. 110, 11 Am. St. Rep. 28, 5 South. 497; *De Sobry v. De Laistre*, 2 Har. & J. 191, 3 Am. Dec. 535; *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572, 35 N. E. 951; *Tabor v. Judd*, 62 N. H. 288. A letter must, however, contain something in conflict with the testimony of the witness or it is inadmissible: *Phoenix Ins. Co. v. Gray*, 107 Ga. 110, 32 S. E. 948. Letters written by the prosecutrix in a seduction case, in which she charges another than the defendant with being the father of her child, are admissible to contradict her testimony at the trial: *Davis v. State*, 36 Tex. Cr. Rep. 548, 38 S. W. 174.

While books of science are generally inadmissible to prove opinions contained in them, yet where a witness refers to them as the authority for his own opinions, they may be introduced for the purpose of contradicting him: *New Jersey Zinc Co. v. Lehigh Zinc Co.*, 59 N. J. L. 189, 35 Atl. 915.

Affidavits made by witnesses, and which are at variance with their testimony, are admissible to affect their credibility: *Walrod v. Webster County*, 110 Iowa, 349, 81 N. W. 598; *United States v. Pagliano*, 53 Fed. 1001; *Tucker v. United States*, 151 U. S. 164, 14 Sup. Ct. Rep. 299; *People v. Samonset*, 97 Cal. 448, 32 Pac. 520. Indeed, any statement signed by the witness is admissible to impeach, if it conflicts with his testimony: *Baumer v. French*, 8 N. Dak. 319, 79 N. W. 340; *Barker v. Lawrence Mfg. Co.*, 176 Mass. 203, 57 N. E. 366. Such a statement is admissible if signed by the witness, though it was reduced to writing by a third person: *Hughes v. Delaware etc. Canal Co.*, 176 Pa. St. 254, 35 Atl. 190. The fact that the sworn statement of a witness was made at the instance of an agent of the party offering it and without notice to the other party is immaterial: *Sullivan v. Jefferson Ave. Ry. Co.*, 133 Mo. 1, 84 S. W. 566. A certificate of death signed by a physician is admissible to contradict his later testimony as to the cause of death: *Smith v. Standard Life etc. Co.*, 80 Minn. 291, 83 N. W. 342.

A written report made by a witness may be read in evidence to contradict his testimony: *Lynch v. Postlethwaite*, 7 Mart. 69, 12 Am. Dec. 495. Hence, the written reports of railroad employes as to the cause of and the circumstances surrounding an accident are admissible to impeach their testimony: *Freel v. Market St. etc. Ry. Co.*, 97 Cal. 40, 31 Pac. 730; *Chicago etc. Ry. Co. v. Artery*, 137 U. S. 507, 11 Sup. Ct. Rep. 129. The testimony of one partner may be contradicted by his written agreement: *Deal v. Bogue*, 20

Pa. St. 228, 57 Am. Dec. 702. Where an officer who made the tax returns to show the value of a water company's plant testifies as a witness as to the value of such plant, the tax returns are admissible in evidence to contradict him: *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533.

Collateral Matters no Foundation for Impeachment.—The rule is firmly established that a witness cannot be impeached by showing the falsity of his testimony concerning facts collateral to the issue. Or, as it is frequently stated, an answer by a witness upon cross-examination, upon a merely collateral matter, cannot be contradicted: *Combs v. Winchester*, 39 N. H. 18, 75 Am. Dec. 203; *Seavy v. Dearborn*, 19 N. H. 355; *Stevens v. Beach*, 12 Vt. 585, 36 Am. Dec. 359; *Fletcher v. Boston etc. R. R.*, 1 Allen, 9, 79 Am. Dec. 695; *North Chicago St. R. R. Co. v. Southwick*, 165 Ill. 494, 46 N. E. 377; *Johnson v. Brown*, 130 Ind. 534, 28 N. E. 698; *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407; *Atchison etc. R. R. Co. v. Townsend*, 39 Kan. 115, 17 Pac. 804; *Trabing v. California Nav. etc. Co.*, 121 Cal. 137, 53 Pac. 644; *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *Bersch v. State*, 13 Ind. 434, 74 Am. Dec. 263; *People v. Greenwall*, 108 N. Y. 296, 2 Am. St. Rep. 415, 15 N. E. 404; *State v. Summer*, 53 S. C. 32, 74 Am. St. Rep. 707, 32 S. E. 771; *Pullen v. Pullen*, 43 N. J. Eq. 136, 6 Atl. 887; *Paddock v. Kappahan*, 41 Minn. 528, 43 N. W. 893; *Woodroffe v. Jones*, 83 Me. 21, 21 Atl. 177; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *Crusoe v. Clark*, 127 Cal. 341, 59 Pac. 700; *Olty Pass. Ry. Co. v. Tanner*, 90 Md. 315, 45 Atl. 188; *Gregg v. Willis*, 71 Vt. 313, 45 Atl. 188; *Myers v. State*, 51 Neb. 517, 71 N. W. 33; *Gulf etc. Ry. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492.

The party asking the collateral question cannot contradict the witness, but is bound by the answer given: *Stevens v. Beach*, 12 Vt. 585, 36 Am. Dec. 359; *Fletcher v. Boston etc. R. R. Co.*, 1 Allen, 9, 79 Am. Dec. 695; *Trabing v. California Nav. etc. Co.*, 121 Cal. 137, 53 Pac. 644; *People v. Greenwall*, 108 N. Y. 296, 2 Am. St. Rep. 415, 15 N. E. 404; *Carpenter v. Lingenfelter*, 42 Neb. 728, 60 N. W. 1022; *Crawford v. State*, 112 Ala. 1, 21 South. 214; *Franklin v. Franklin*, 90 Tenn. 44, 16 S. W. 557; *Merchants' Life Assn. v. Yoakum*, 98 Fed. 251.

Great latitude is allowed in cross-examination for the purpose of discrediting a witness: *Great West. Turnpike Road Co. v. Loomis*, 32 N. Y. 127, 88 Am. Dec. 311. And for this purpose cross-examination is frequently permitted and more frequently indulged in upon matters which are collateral to the issue. The mere fact that a party is bound by the answer of a witness upon cross-examination as to collateral matters shows that such cross-examination is frequent. But where the sole purpose of the cross-examination is to lay a foundation for impeachment, the evidence must be material or relate to a fact brought out by his direct examination: *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *State v. Grant*, 144 Mo.

58, 45 S. W. 1102; *Galnes v. State*, 38 Tex. Cr. Rep. 202, 42 S. W. 385. As was stated in *Combs v. Winchester*, 39 N. H. 13, 75 Am. Dec. 203, a witness cannot be interrogated on a subject not pertinent to the issue, for the purpose of contradicting him. See, also, *Trabing v. California Nav. etc. Co.*, 121 Cal. 137, 53 Pac. 644; *Crawford v. State*, 112 Ala. 1, 21 South. 214. The cause and nature of the trouble which an impeaching witness has had with the witness sought to be impeached is a collateral matter and may be excluded: *Bertoli v. Smith*, 69 Vt. 425, 38 Atl. 76.

Since collateral matters cannot be made the basis of impeaching a witness by contradicting him, the question naturally arises, What are collateral matters? What test can be applied to determine whether a question is collateral to the issues or not? The very generally approved test may be found stated in the syllabus to *Saunders v. City etc. R. R. Co.*, 99 Tenn. 180, 41 S. W. 1031, as follows: "Would the cross-examining party be entitled to prove the fact as a part of, and as tending to establish, his case? If he would be allowed to do so, the matter is not collateral; but, if he would not be allowed to do so, it is collateral. Collateral matters, in this sense, are such as afford no reasonable inference as to the principal matter in dispute." A frequently quoted test is cited in *Combs v. Winchester*, 39 N. H. 13, 75 Am. Dec. 203: "The test whether the matter is collateral or not is this: If the answer of the witness is a matter which you would be allowed on your part to prove in evidence—if it had such a connection with the issue that you would be allowed to give it in evidence—then it is a matter on which you may contradict him." As following the test above stated, see *Williams v. State*, 73 Miss. 820, 19 South. 826; *Johnston v. Spencer*, 51 Neb. 198, 70 N. W. 982; *Askew v. People*, 23 Colo. 446, 48 Pac. 524; *Hildeburn v. Curran*, 65 Pa. St. 59; *Welch v. State*, 104 Ind. 347, 3 N. E. 850. This test, however, applies solely to the subject matter of the inquiry, and not to the admissibility of the particular evidence offered in proof of it: *Williams v. State*, 73 Miss. 820, 19 South. 826. For what a witness who is not a party states out of court is not evidence in chief to prove that the fact is as stated by him. Such evidence is hearsay, and can be used solely to discredit: *Law v. Fairfield*, 46 Vt. 425; *Trauerman v. Lippincott*, 39 Mo. App. 478; *Catlin v. Michigan Cent. R. R. Co.*, 66 Mich. 358, 33 N. W. 515.

We shall subsequently see that matters which show bias or hostility on the part of a witness are not deemed collateral to the issues in the case, so that the witness cannot be contradicted if he denies them. As to whether a witness who has been convicted of a crime and who, on cross-examination, denies it, can be contradicted, or whether this is a collateral matter and the answer is binding and conclusive on the cross-examining party, there seems to be some question. The matter was left open in *Pullen v. Pullen*, 43 N. J. Eq. 136, 6 Atl. 887. Where the question relates to mere

charges against the witness, as an indictment or arrest, or any specific offense of which he has not been convicted, it would seem that the answer was conclusive, and that the witness could not be contradicted: See *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *Linehan v. State*, 113 Ala. 70, 21 South. 497; *Tyrrell v. State* (Tex.), 38 S. W. 1011. Thus, in *Winn v. Winn*, 23 Tex. Civ. App. 617, 57 S. W. 80, it was held that if a witness denied that he had committed a crime, he could not be impeached by proof that he did do it. But it would seem that where the witness has been convicted of a crime of such a nature that the conviction may be shown to impeach the character of the witness, that such conviction could be shown, although the effect is to contradict the witness on an immaterial and collateral matter. And it has been held that the record of the conviction of the witness may be introduced in evidence after he has denied the conviction, although extraneous evidence that he had committed the crime would be inadmissible: *State v. Wyse*, 83 S. C. 582, 12 S. E. 556.

Impeach by Showing Hostility or Bias.—The hostility or bias of a witness toward one of the parties to the action may be shown for the purpose of affecting the credibility of the witness: *Butler v. State*, 34 Ark. 480; *Polk v. State*, 62 Ala. 237; *Conyers v. Field*, 61 Ga. 258; *Beardsley v. Wildman*, 41 Conn. 515; *Phenix v. Castner*, 108 Ill. 207; *Lucas v. Flinn*, 35 Iowa, 9; *Chelton v. State*, 45 Md. 564; *State v. Jones*, 108 Mo. 802, 17 S. W. 366; *Schultz v. Third Ave. R. R. Co.*, 89 N. Y. 242; *Teets v. Middletown*, 106 N. Y. 651, 12 N. E. 847; *McHugh v. State*, 31 Ala. 317; *Mears v. Cornwall*, 73 Mich. 78, 40 N. W. 931; *Davis v. Roby*, 64 Me. 427.

The state of feelings of a witness toward the adverse party is not deemed an irrelevant or collateral matter. Hence if the witness denies his enmity or bias toward such party, he may be contradicted by the testimony of other persons to the fact of such hostility: *Phenix v. Castner*, 108 Ill. 207; *Skinner v. State*, 120 Ind. 127, 22 N. E. 115; *Eldridge v. State*, 27 Fla. 162, 9 South. 448; *Helwig v. Lascowski*, 82 Mich. 619, 46 N. W. 1033; *McGuire v. McDonald*, 99 Mass. 49; *Long v. Lamkin*, 9 Oush. 361; *Kent v. State*, 42 Ohio St. 426; *Hayes v. Smith*, 62 Ohio St. 161, 56 N. E. 879; *McFarlin v. State*, 41 Tex. 23; *State v. Glynn*, 51 Vt. 577; *Langhorne v. Commonwealth*, 76 Va. 1012. This is deemed a well-recognized exception to the rule that a witness cannot be contradicted as to a collateral matter: *Hayes v. Smith*, 62 Ohio St. 161, 56 N. E. 879. While the fact of enmity or unfriendliness can be shown, it is not permissible to prove the details of the quarrel or difficulty which caused the hostility: *Polk v. State*, 62 Ala. 237. The facts and circumstances causing the prejudice or ill-feeling cannot be gone into by the witness: *Butler v. State*, 34 Ark. 480; *Conyers v. Field*, 61 Ga. 258; *Chelton v. State*, 45 Md. 564; *Langhorne v. Commonwealth*, 76 Va. 1012. The inquiry is said to be

so far collateral to the issue that detail will not be permitted: *State v. Glynn*, 51 Vt. 577. The extent of the inquiry was thus stated in *State v. Dee*, 14 Minn. 35: "The particulars of the hostility of feeling may be inquired into. . . . An inquiry into particulars beyond what is proper to ascertain the extent and nature of the hostile feeling should not, we think, be allowed, as it would lead to interminable investigations."

It is not necessary that the quarrel should relate to the subject matter of the suit: *Beardsley v. Wildman*, 41 Conn. 515. The conduct and acts of the parties producing the hostility is another and collateral issue, aside even from the fact of hostility itself, and cannot be shown: *Eldridge v. State*, 27 Fla. 162, 9 South. 448. The facts which show the hostility or bias may be shown: *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *Drum v. Harrison*, 83 Ala. 384, 3 South. 715. But it is not competent to call for independent facts unless they show a bad or revengeful feeling. Facts which of themselves do not and cannot show bias or hostility cannot be inquired about: *Carpenter v. State*, 98 Ala. 81, 13 South. 534. The fact of hostility may be shown by any competent evidence, either by proof of the fact upon cross-examination, or witnesses may be called who can swear to the facts showing it: *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *Garnsey v. Rhodes*, 138 N. Y. 461, 34 N. E. 199; *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; *Day v. Stickney*, 14 Allen, 255; *People v. Gardner*, 98 Cal. 127, 32 Pac. 890; *People v. Anderson*, 105 Cal. 82, 38 Pac. 518. The fact that the circumstances which show the bias of a witness may also prejudice the jury against the party in whose favor the witness is testifying is immaterial, and furnishes no reason for the exclusion of the evidence: *State v. McGahey*, 3 N. Dak. 293, 55 N. W. 753; *Crist v. State*, 21 Tex. App. 361, 17 S. W. 260.

As to the time when the hostility must appear in order to make the evidence admissible, there can be laid down no fast and hard rule. If the hostility arose a considerable period prior to the date of the trial, this would appear to be no reason for the exclusion of the evidence if the hostility and prejudice had continued. Threats made eleven months before the trial, which showed the hostility of the witness, were held admissible in *State v. Dee*, 14 Minn. 35. But it would seem to be necessary to make it appear either that the hostility existed at the time of the trial, or that it had arisen so recently that it can be assumed to continue: *Higham v. Gault*, 15 Hun, 383.

Where the witness admits his enmity or hostility to the party, it is not error to exclude the testimony of a third person relative to statements which the witness had made indicative of such hostility: *Jennings v. State* (Tex. Cr.), 57 S. W. 642.

Before a witness can be contradicted as to the fact of his hostility, a proper foundation must be laid by calling the attention of the witness to his own statements or acts which show such hos-

tility or bias: *Langhorne v. Commonwealth*, 76 Va. 1012; *McKnight v. United States*, 97 Fed. 208; *Galveston etc. Ry. Co. v. La Prelle*, 22 Tex. Civ. App. 593, 55 S. W. 125; *Mitchell v. State*, 38 Tex. Cr. Rep. 170, 41 S. W. 816; *Edwards v. Sullivan*, 8 Ired. 302; *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *Nite v. State* (Tex. Cr.), 54 S. W. 763.

In those states where no foundation is required to be laid in order to contradict a witness, no foundation is required to be laid to contradict a witness upon the question of his bias or hostility: See *New Portland v. Kingfield*, 55 Me. 172; *Cook v. Brown*, 34 N. H. 460; *Day v. Stickney*, 14 Allen, 255. In some jurisdictions, however, where ordinarily a foundation must be laid to contradict a witness, his statements which show hostility or bias are considered of a different character, and no foundation is required to be laid: *Martin v. Barnes*, 7 Wis. 239; *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189. In this last case cited it was said that "there can be no reason for holding that the witness must first be examined as to his hostility, and that then, and not till then, witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice; and as that may be proved by any competent evidence, we see no reason for holding that he must first be examined as to his hostility."

Malice against a party to the action, or corruption with reference to the attendance of witnesses at the trial or with reference to the evidence, may be shown to affect credibility: *Askew v. People*, 23 Colo. 446, 48 Pac. 524. Letters written by a witness tending to show that he is corrupt and is concealing or perverting the truth for a consideration, are admissible: *Alward v. Oakes*, 63 Minn. 190, 65 N. W. 270. Any corrupt conduct on the part of a witness which shows an attempt to bribe witnesses or which indicates any agreement to suppress testimony for a consideration, is admissible: *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1. Such evidence is not collateral to the issues in the case, and if the witness denies the corrupt conduct, he may be contradicted by evidence showing that he did make the corrupt offers: *Morgan v. Freese*, 15 Barb. 352; *Bates v. Holladay*, 31 Mo. App. 162; *Richardson v. State*, 90 Md. 109, 44 Atl. 939; *State v. McKinstry*, 100 Iowa, 82, 69 N. W. 267; *White v. Houston etc. R. R. Co.* (Tex. Civ. App.), 46 S. W. 382. An attempt at bribery shows the bias and partisanship of the witness: *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833. It also shows the immoral disposition in the party to bring about a false and unjust result in the cause. It impeaches his moral character: *Williams v. Dickenson*, 28 Fla. 90, 9 South. 847. The fact that a witness had been offered a bribe by one of the parties is not admissible, to show bias or discredit him where he denies having

said that any bribe was offered him: *McNeill v. Metropolitan St. Ry. Co.*, 20 Misc. Rep. 426; 45 N. Y. Supp. 1030.

There is, of course, an endless variety of situations which may be proved in evidence for the purpose of showing the bias or hostility of a witness. Thus it is proper to ask a witness on cross-examination if she had not had improper relations with the defendant to show her bias: *Martin v. State*, 125 Ala. 64, 28 South. 92. See *Franklin v. Commonwealth*, 20 Ky. L. Rep. 1137, 48 S. W. 986. A party may show that the witness was urging the prosecution for the purpose of forcing the defendant to pay certain debts: *Wadley v. Commonwealth*, 98 Va. 803, 35 S. E. 452. Evidence is admissible to prove that one of the defendants had accused the state's witness of larceny: *People v. Turney*, 124 Mich. 542, 83 N. W. 273. The defendant may prove that the prosecuting witness said he believed the defendant guilty and desired to see him hung: *Reddick v. State* (Tex. Cr.), 47 S. W. 993. Evidence is admissible to prove that one of defendant's witnesses had attempted to persuade a state's witness to fail to identify the defendant: *Webb v. State* (Tex. Cr. App.), 58 S. W. 82. One may ask a witness for the prosecution if the deceased was not her lover to show bias against the defendant: *People v. Worthington*, 105 Cal. 166, 38 Pac. 689. The widow of the deceased who is a witness for the defendant may be asked if she has not agreed to pay the defendant's attorneys' fees: *Magruder v. State*, 35 Tex. Cr. Rep. 214, 33 S. W. 233. While the former expression of an opinion cannot generally be shown, an opinion may be proved where it indicates hostility: *Dudley v. Satterlee*, 28 N. Y. Supp. 741; 59 N. Y. St. Rep. 265.

A witness may always be questioned as to his relationship to the parties, for the purpose of affecting the credibility of his testimony by showing his bias: *Bersch v. State*, 13 Ind. 434, 74 Am. Dec. 263; *Jernigan v. Flowers*, 94 Ala. 508, 10 South. 437; *Wallace v. State*, 28 Ark. 531; *Michigan etc. Co. v. Wilcox*, 78 Mich. 431, 44 N. W. 281; *State v. Bacon*, 13 Or. 143, 57 Am. Rep. 8, 9 Pac. 393; *People v. Bush*, 71 Cal. 602, 12 Pac. 781. The mere fact of relationship does not of itself discredit a witness, though it may be considered: *Gangwere's Estate*, 14 Pa. St. 417, 53 Am. Dec. 554. Inquiry as to the feelings of a witness against a party to the action should be confined to his feelings against such party, and it cannot be shown that he entertained unfriendly feelings against the mother and brother of the party: *State v. Welch*, 38 Or. 33, 54 Pac. 213. Evidence of business relations is admissible to affect credibility: *Totten v. Burhans*, 103 Mich. 6, 61 N. W. 58.

The relation of master and servant may be inquired about to show the bias or interest such a witness might have in the case: *Central R. R. Co. v. Maltby*, 90 Ga. 630, 16 S. E. 953. A jury may take into consideration the fact that a witness is the employé of the party in whose favor he is testifying: *Illinois Cent. R. R. Co.*

v. Haskins, 115 Ill. 300, 2 N. E. 654; *Ellis v. Railroad Co.*, 138 Pa. St. 506, 21 Am. St. Rep. 914, 21 Atl. 140. But the court cannot instruct the jury that any suspicion attaches to the testimony of a witness simply because he is the servant or employé of one of the parties: *Marquette etc. R. R. Co. v. Kirkwood*, 45 Mich. 51, 40 Am. Rep. 453, 7 N. W. 209. A witness may be asked on cross-examination if he did not believe that, if he testified to facts showing that he had been guilty of negligence in operating his engine, he would be discharged, since the existence or nonexistence of such a belief naturally affects his credibility as a witness: *Chicago etc. R. R. Co. v. Thomas*, 155 Ind. 634, 58 N. E. 1040; *Haver v. Central R. R. Co.*, 64 N. J. L. 312, 45 Atl. 593. Evidence that a witness formerly in the employ of one of the parties was discharged is inadmissible, in the absence of any testimony showing how recent or remote in time the discharge was: *Missouri etc. Ry. Co. v. St. Clair*, 21 Tex. Civ. App. 345, 51 S. W. 666.

The direct interest of a witness in a suit may be considered in determining the weight of his testimony: *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98. The interest of a witness in the result of the suit may be shown to affect his credibility: *Jernigan v. Flowers*, 94 Ala. 508, 10 South. 437; *Gould v. Stafford*, 91 Cal. 146, 27 Pac. 543; *Cady v. Bradshaw*, 116 N. Y. 188, 22 N. E. 371; *Slissinch v. Bernherdt*, 29 Misc. Rep. 652; 61 N. Y. Supp. 107; *Litten v. Wright School Township*, 127 Ind. 81, 20 N. E. 567. But where the interest of the witness has been fully shown by his cross-examination, it is not reversible error to exclude further testimony on that point: *Shannon v. Tama City*, 74 Iowa, 22, 36 N. W. 776. A witness may be asked if he has made a wager on the result of the suit: *People v. Parker*, 137 N. Y. 535, 32 N. E. 1013. In an action of tort against an insurance agent for fraudulently inducing the plaintiff to take a policy, it may be shown the amount of commissions the agent was to receive, and that he was working for a prize offered by the company to the agent who should return the largest amount of insurance: *McKindley v. Drew*, 69 Vt. 210, 37 Atl. 285. It is competent to ask a witness whether or not his wife has an interest in the property in controversy: *Renoux v. Geney*, 32 Misc. Rep. 702; 65 N. Y. Supp. 508. An attorney for the plaintiff who is called as a witness in his behalf may be asked whether his compensation is contingent upon a recovery by his client: *Harrington v. Hamburg*, 85 Iowa, 272, 52 N. W. 201; *Stewart v. Kindel*, 15 Colo. 539, 25 Pac. 990. But it cannot be shown that an attorney has brought other suits against the defendant: *Franklin v. Third Ave. R. R. Co.*, 52 App. Div. 512; 65 N. Y. Supp. 434. A witness in a criminal case may be asked whether he is to receive a reward in case the defendant is convicted: *Taylor v. United States*, 89 Fed. 954. The fact that a physician was employed for the express purpose of having him testify in the case

may be shown to affect his credibility: *Jones v. Portland*, 88 Mich. 598, 50 N. W. 731.

Evidence that the witness had defaced a picture of the defendant is too remote and uncertain to prove malice and ill-will, and is inadmissible for that purpose: *State v. Punshon*, 133 Mo. 44, 34 S. W. 25. Practically any situation or statement or circumstance which shows bias or hostility or ill-will against the adverse party may be shown to affect the credibility of a witness.

Impeaching One's Own Witnesses.—The general rule is that a party cannot impeach or discredit his own witness, and if such a witness gives testimony adverse to the party calling him, he must abide the event: *Hickory v. United States*, 151 U. S. 303, 14 Sup. Ct. Rep. 334; *McDade v. State*, 27 Tex. App. 641, 11 Am. St. Rep. 216, 11 S. W. 672; *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Dixon v. State*, 86 Ga. 754, 18 S. E. 87; *State v. Keefe*, 54 Kan. 197, 38 Pac. 302; *Hall v. Chicago etc. Ry. Co.*, 84 Iowa, 311, 51 N. W. 150; *Bullard v. Pearsall*, 53 N. Y. 230; *Richards v. State*, 82 Wis. 172, 51 N. W. 652; *Franklin Bank v. Pennsylvania etc. Nav. Co.*, 11 Gill & J. 28, 33 Am. Dec. 687; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *Webber v. Jackson*, 79 Mich. 175, 19 Am. St. Rep. 165, 44 N. W. 591; *Hurley v. State*, 46 Ohio St. 320, 21 N. E. 645; *Erwin v. State*, 32 Tex. Cr. Rep. 519, 24 S. W. 904.

The rule is generally stated to be that a party cannot directly impeach his own witnesses: *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Bullard v. Pearsall*, 53 N. Y. 230; *Richards v. State*, 82 Wis. 172, 51 N. W. 652; *Swamscot Mach. Co. v. Walker*, 22 N. H. 457, 55 Am. Dec. 172. By offering a person as a witness, a party is said to assert that he is worthy of belief: *State v. Keefe*, 54 Kan. 197, 38 Pac. 302; *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583. This reason has, however, been repeatedly and vigorously assailed. A party calling a witness is not absolutely bound by his statements: *Bullard v. Pearsall*, 53 N. Y. 230; *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 67 Am. St. Rep. 154, 22 South. 903; *Jones v. State*, 115 Ala. 67, 22 South. 566. And the better rule seems to be that a party does not by calling a witness thereby indorse his credibility: *Jarnigan v. Fleming*, 43 Miss. 710, 5 Am. Rep. 514; *Selover v. Bryant*, 54 Minn. 434, 49 Am. St. Rep. 349, 56 N. W. 58; *Jones v. State*, 115 Ala. 67, 22 South. 566; *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 67 Am. St. Rep. 154, 22 South. 903. A party does not vouch for the credibility of witnesses called by him any further than this, that he cannot impeach them in the same manner and as fully as he may the witnesses of the adverse party.

A party may, however, show that the facts are not as stated by his own witness; he is not estopped or precluded by the false testimony of one witness from proving by other witnesses what the truth is: *Hickory v. United States*, 151 U. S. 303, 14 Sup. Ct. Rep. 334; *Bullard v. Pearsall*, 53 N. Y. 230; *Jones v. State*, 115 Ala. 67, 22 South. 566; *Blackwell v. Wright*, 27 Neb. 269, 20 Am. St. Rep.

662, 43 N. W. 116; *Champ v. Commonwealth*, 2 Met. (Ky.) 17, 74 Am. Dec. 388; *Olmstead v. Winsted Bank*, 82 Conn. 278, 85 Am. Dec. 260; *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583; *Swamscot Mach. Co. v. Walker*, 22 N. H. 457, 55 Am. Dec. 172; *Franklin Bank v. Pennsylvania Nav. Co.*, 11 Gill & J. 28, 33 Am. Dec. 687; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *Stockton v. Demuth*, 7 Watts, 39, 32 Am. Dec. 735; *Norwood v. Kenfield*, 80 Cal. 394; *Thorp v. Leibrecht*, 56 N. J. Eq. 499, 39 Atl. 361; *Goeschel v. Fisher*, 108 Mich. 212, 65 N. W. 965; *Coulter v. American etc. Exp. Co.*, 56 N. Y. 585; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Brown v. Wood*, 19 Mo. 475; *Chester v. Wilhelm*, 111 N. C. 314, 16 S. E. 229. A party may do this although the truth as shown by other witnesses contradicts the witness he has first called: *Blackwell v. Wright*, 27 Neb. 269, 20 Am. St. Rep. 662, 43 N. W. 116; and although this may tend incidentally to discredit his own witness: *Hickory v. United States*, 151 U. S. 803, 14 Sup. Ct. Rep. 334; *Olmstead v. Winsted Bank*, 32 Conn. 278, 85 Am. Dec. 260; *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583; *Coulter v. American etc. Exp. Co.*, 56 N. Y. 585; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Brown v. Wood*, 19 Mo. 475; *Chester v. Wilhelm*, 111 N. C. 314, 16 S. E. 229. Similarly, a party who introduces the books of a bank in evidence cannot attack or discredit them as a whole, but may show errors in particular items: *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394.

An exception to the rule that a party cannot discredit his own witness exists in the case of a witness which a party is bound by law to call; as, for example, the subscribing witnesses to a will. In such a case the witness is regarded as a witness of the law rather than of the party. Hence he may be impeached by showing that he has previously made statements contradicting those he made at the trial: *Brown v. Bellows*, 4 Pick. 179; *Thompson v. Owen*, 174 Ill. 229, 51 N. E. 1046; *Pickard v. Bryant*, 92 Mich. 430, 52 N. W. 788; *People v. Case*, 105 Mich. 92, 62 N. W. 1017; *Harden v. Hays*, 9 Pa. St. 151. And it seems that a party in impeaching such a witness is not confined to proof that he had previously made contradictory statements, but he may prove his generally bad character and thus show that he is undeserving of credit: *Williams v. Walker*, 2 Rich. Eq. 291, 46 Am. Dec. 53; *State v. Slack*, 69 Vt. 486, 88 Atl. 311.

Where a party introduces a witness whose testimony takes him by surprise, and who is found to be adverse to the party calling him, the question frequently arises as to the manner of treating such a witness. Can the party calling him show that he has made prior statements inconsistent with his present testimony? Certainly, he can show that such a witness is adverse to him, or that his interest lies with the other party: *Pittsburgh etc. Ry. Co. v. Carlson*, 24 Ind. App. 559, 56 N. E. 251. And a party may examine his own witness as to previous statements he made inconsistent

with his testimony. Such an examination is not considered an impeachment of one's own witness: *Binyon v. State* (Tex. Cr.), 56 S. W. 339; *Spaulding v. Chicago etc. Ry. Co.*, 98 Iowa, 205, 67 N. W. 227.

Testimony of this kind is receivable to explain the attitude of the party calling the witness, and also to refresh the recollection of the witness, so as to lead him, if mistaken, to correct his testimony: *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875, 5 S. W. 527; *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 241; *Thomas v. State*, 117 Ala. 178, 23 South. 665; *Collins v. Hoehle*, 99 Wis. 639, 75 N. W. 416; *McNerney v. Reading City*, 150 Pa. St. 611, 25 Atl. 57; *Spaulding v. Chicago etc. Ry. Co.*, 98 Iowa, 205, 67 N. W. 227; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Hard v. Densmore*, 28 App. Div. 365; 51 N. Y. Supp. 157; *Becker v. Koch*, 104 N. Y. 394, 58 Am. Rep. 515, 10 N. E. 701; *Hemingway v. Garth*, 51 Ala. 530; *Hurley v. State*, 46 Ohio St. 320, 21 N. E. 645.

When a witness of a party is found to be adverse to him, he may be cross-examined by the party calling him the same as any other witness, even by putting leading questions to him, since the danger arising from such a mode of examination by the party calling a friendly witness does not exist: *Becker v. Koch*, 104 N. Y. 394, 58 Am. Rep. 515, 10 N. E. 701; *Fitzpatrick v. State*, 37 Tex. Cr. Rep. 20, 38 S. W. 306. Such evidence is admissible, although its indirect effect is to impeach the witness by the party calling him: *Thomas v. State*, 117 Ala. 178, 23 South. 665. On the point as to whether a party may cross-examine his own witness upon his previous inconsistent statements, solely for the purpose of refreshing his memory and to explain the attitude of the party calling him so as to place him in the right position before the jury, the authorities are quite harmonious. If, however, the witness denies having made the prior contradictory statements, the decisions are in direct conflict as to whether such statements may be proved by other evidence. The weight of authority would appear to be against the right to prove inconsistent statements by other witnesses: *Hurley v. State*, 46 Ohio St. 320, 21 N. E. 645; *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150, 70 Am. St. Rep. 466, 52 N. E. 1095; *Coulter v. American etc. Ex. Co.*, 56 N. Y. 585; *Nichols v. White*, 85 N. Y. 531; *Brewer v. Porch*, 17 N. J. L. 377; *Stearns v. Merchants' Bank*, 53 Pa. St. 490; *Spaulding v. Chicago etc. Ry. Co.*, 98 Iowa, 205, 67 N. W. 227; *Hickory v. United States*, 151 U. S. 303, 14 Sup. Ct. Rep. 334; *Adams v. Wheeler*, 97 Mass. 67; *Collins v. Hoehle*, 99 Wis. 639, 75 N. W. 416; *Richards v. State*, 82 Wis. 172, 51 N. W. 652; *Becker v. Koch*, 104 N. Y. 394, 58 Am. Rep. 515, 10 N. E. 701.

There is respectable authority to sustain the opposite rule, that a party may, when he is surprised by the testimony of his own witness, show his previous contradictory statements: *State v. Norris*, 1 Hayw. (N. O.) 429, 1 Am. Dec. 564; though this case seems to be overruled in *State v. Taylor*, 88 N. O. 694; *Selover v. Bryant*,

54 Minn. 434, 40 Am. St. Rep. 349, 56 N. W. 58; State v. Bloor, 20 Mont. 574, 52 Pac. 611; State v. Corcoran (Idaho), 61 Pac. 1034; White v. State, 10 Tex. App. 381; Smith v. Briscoe, 65 Md. 561, 5 Atl. 334; State v. Sorter, 52 Kan. 531, 34 Pac. 1036; State v. Bartmess, 38 Or. 110, 54 Pac. 167; Miller v. Cook, 127 Ind. 339, 26 N. E. 1072; People v. Jacobs, 49 Cal. 384.

In some jurisdictions the matter seems to be left very largely in the discretion of the trial judge: Miller v. Cook, 127 Ind. 339, 26 N. E. 1072; State v. Sorter, 52 Kan. 531, 34 Pac. 1036. In Dunn v. Dunnaker, 87 Mo. 597, it was held that unless a party is entrapped into offering a hostile witness who has made prior conflicting statements, evidence of those contradictory statements is not admissible. Generally, however, the authorities do not take such an extreme position and require a party to show that he has been entrapped by the witness. And while one who has been entrapped by a hostile witness may show his previous inconsistent statements: Moore v. Chicago etc. R. R. Co., 59 Miss. 243; yet it would seem to be sufficient if the party has been taken by surprise and the evidence is contrary to what he had reason to believe the witness would testify to: Smith v. Briscoe, 65 Md. 561, 5 Atl. 334; State v. Sorter, 52 Kan. 531, 34 Pac. 1036. It was said in Smith v. Briscoe, 65 Md. 561, 5 Atl. 334, that such evidence was admissible not for the purpose of impeaching the character of the witness, but for the protection of the party calling him. The most elaborate and satisfactory statement of the rule that the contradictory statements of one's own witness may be introduced in evidence is to be found in Selover v. Bryant, 54 Minn. 434, 40 Am. St. Rep. 349, 56 N. W. 58. This vexing question has been set at rest in several of the states by statute, thus fixing the right of a party to discredit his own witness who has surprised him and testified contrary to what he had stated prior to his taking the witness stand, by showing by third parties what his contradictory statements were: See White v. State, 10 Tex. App. 381; Southwestern Coal etc. Co. v. Rohr, 15 Tex. Civ. App. 404, 39 S. W. 1017; Blake v. State, 38 Tex. Cr. Rep. 377, 43 S. W. 107; Thompson v. State, 29 Tex. App. 208, 15 S. W. 206; Conway v. State, 118 Ind. 482, 21 N. E. 285; Schnuer v. State, 18 Ind. App. 226, 47 N. E. 843; Dixon v. State, 86 Ga. 754, 13 S. E. 87; Williams v. Dickenson, 28 Fla. 90, 9 South. 847; Blackburn v. Commonwealth, 12 Bush, 181; Champ v. Commonwealth, 2 Met. (Ky.) 17, 74 Am. Dec. 388; People v. Mitchell, 94 Cal. 550, 29 Pac. 1106; People v. Kruger, 100 Cal. 523, 35 Pac. 88; Hurlburt v. Hurlburt, 63 Vt. 667, 22 Atl. 850; State v. Bloor, 20 Mont. 574, 52 Pac. 611; State v. Corcoran (Idaho), 61 Pac. 1034. These statutes are not all alike in their terms, so that the practice may be quite different in different states. Thus, in California it would appear that the party must be surprised in order to render admissible evidence of contradictory statements: People v. Kruger, 100 Cal. 523, 35 Pac. 88. In Georgia the party must have

been deceived and entrapped into introducing the witness, or his inconsistent statements cannot be proved: *Dixon v. State*, 86 Ga. 754, 13 S. E. 87. On the other hand, in Texas, a party is not required even to be surprised by the testimony of his own witness. Indeed, the witness may even have told the party he would testify as he did, and the party may prove his contradictory statements, if the circumstances are such as would lead the party to believe that the witness would not perjure himself: *Blake v. State*, 38 Tex. Cr. Rep. 377, 43 S. W. 107.

It is not in every case that one's own witness may be contradicted by proof of his prior statements, even in those jurisdictions where such proof is permitted. The rule has its well-defined limitations. It is not every trivial or immaterial circumstance that will justify such a course. Generally, a party must be surprised in order to prove the contradictory statements of his own witness: *Smith v. Briscoe*, 65 Md. 561, 5 Atl. 334; *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429, 27 N. E. 866; *People v. Kruger*, 100 Cal. 523, 35 Pac. 88. The contrary doctrine is held in Texas: *Blake v. State*, 38 Tex. Cr. Rep. 377, 43 S. W. 107. In *Smith v. Briscoe*, 65 Md. 561, 5 Atl. 334, proof of prior statements was restricted to declarations made to the party calling him or to his attorney, and made in reference to the particular case pending, and that the rule would not be extended to declarations made to other persons.

A party cannot prove the prior statements of his witness where he merely fails to prove by such witness certain facts supposed to be beneficial to his side: *Champ v. Commonwealth*, 2 Met. (Ky.) 17, 74 Am. Dec. 388; *People v. Jacobs*, 49 Cal. 384. The mere failure of one's own witness to admit what was sought to be elicited from him, thus disappointing the party who has called him by an inability to prove favorable facts, furnishes no ground for contradicting your own witness: *People v. Crespi*, 115 Cal. 50, 46 Pac. 863; *Commonwealth v. Welsh*, 4 Gray, 535; *Pryor v. Warford*, 21 Ky. L. Rep. 1311, 54 S. W. 839. Hence, where a witness neither testifies in favor of nor against the party who calls him, his prior statements cannot be shown: *Moore v. Chicago etc. R. R. Co.*, 59 Miss. 243.

A party cannot show the previous inconsistent statements of his own witness unless his testimony has been material and prejudicial. There can be no object in impeaching your own witness if he has not testified to anything prejudicial: *Hull v. Dickey*, 93 Ind. 128; *Force v. Martin*, 122 Mass. 5; *Batchelder v. Batchelder*, 139 Mass. 1, 29 N. E. 61. The statutory provisions permitting proof of the contradictory statements of a party's own witness relate solely to prejudicial testimony: *Oldfather v. Zent*, 21 Ind. App. 307, 52 N. E. 236; *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429, 27 N. E. 866; *Williford v. State*, 36 Tex. Cr. Rep. 414,

37 S. W. 761; *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875, 5 S. W. 527.

If a party cannot possibly help his case by impeaching his own witness, such impeachment will not be permitted: *Largin v. State*, 87 Tex. Cr. Rep. 574, 40 S. W. 280. The rule is, therefore, firmly established that a party can discredit his own witness by proof of his contradictory statements, only where such witness has testified to facts which are damaging to the party, and he has been injured by the testimony: *Bailey v. State*, 37 Tex. Cr. Rep. 579, 40 S. W. 280; *People v. Jacoby*, 49 Cal. 384; *Smith v. Briscoe*, 65 Md. 561, 5 Atl. 334; *Erwin v. State*, 32 Tex. Cr. Rep. 519, 24 S. W. 904; *Ohism v. State*, 70 Miss. 742, 12 South. 852; *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106; *McDaniel v. State*, 53 Ga. 253.

Even where the rule prevails that a party cannot contradict his own witness by proof of his prior statements, this only applies where a witness has been called, sworn, and some material testimony given. Hence, if a witness is excused after he is sworn, but before any material question is asked, the party first calling him is not precluded from impeaching his credibility by contradicting him, where the witness subsequently gives material testimony for the other side: *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150, 70 Am. St. Rep. 466, 52 N. E. 1095. And if a party takes the deposition of a witness, but does not read it, he may impeach the witness by proving his contradictory statements if the other party reads the deposition: *Oudworth v. South Carolina Ins. Co.*, 4 Rich. 416, 55 Am. Dec. 692; *Insurance Co. v. Tinney*, 73 Miss. 726, 19 South. 662. In such a case the party originally taking the deposition is not bound to read it: *Richmond v. Richmond*, 10 Yerg. 343. In *Story v. Saunders*, 8 Humph. 663, however, it was held that where the deposition of a witness had been taken by both parties, neither could impeach the credibility of the witness by proof of contradictory statements.

Where a witness is called by both parties, either party may discredit him by showing contrary statements made out of court as to matters testified to in favor of the other party: *Hall v. Manson*, 99 Iowa, 698, 68 N. W. 922. As to entirely new matter brought out on cross-examination, the cross-examining party makes the witness his own as to such new matter, and the rules which we have already discussed govern as to the right of the party to contradict him. Thus, in New York, such a witness cannot be contradicted: *Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447, 51 N. E. 751. In Texas such a witness could not be contradicted if his testimony was not prejudicial: *Woodward v. State* (Tex. Cr.), 58 S. W. 135. By calling the witnesses of the other party one makes them his own, so that he is or is not entitled to prove their contradictory statements, according to the circumstances of the case and the jurisdiction where the case arose. The weight of authority would

be that the party could not impeach his own witness in this manner: *Craig v. Grant*, 6 Mich. 447; *Fairchild v. Bascomb*, 35 Vt. 398. Such a witness may be discredited in any legal manner: *Lewis v. Hodgdon*, 17 Me. 267. What is a legal manner of discrediting one's own witness differs, as has been seen, in different jurisdictions.

The same rule applies where one party calls the other party to testify for him. In some jurisdictions the witness becomes his own so that he cannot impeach him by proof of his contradictory statements. In others, he can contradict him, under the same rules and limitations as apply to other witnesses which a party calls: See *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 67 Am. St. Rep. 154, 22 South. 903; *Thorp v. Leibrecht*, 56 N. J. Eq. 499, 39 Atl. 361; *Webber v. Jackson*, 79 Mich. 175, 19 Am. St. Rep. 165, 44 N. W. 591.

Where a party has testified in his own behalf, evidence cannot be introduced to show that his memory has become weakened, and thus form a basis for argument that he was mistaken in his testimony. This would seem to be nothing more than an attempt to discredit your own witness: *Dundas v. Lansing*, 75 Mich. 499, 13 Am. St. Rep. 457, 42 N. W. 1011. Neither can a party discredit his own witness by asking him if he is not interested in the suit: *Fairly v. Fairly*, 38 Miss. 280.

The rule is elementary and universally accepted that a party cannot impeach the credibility of his own witness by proof that his general reputation for truth and veracity is bad, or by evidence of his immoral character. A party cannot attack the general character of his own witnesses: See *Fairly v. Fairly*, 38 Miss. 280; *Thorp v. Leibrecht*, 56 N. J. Eq. 499, 39 Atl. 361; *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875, 5 S. W. 527; *Olmstead v. Winsted Bank*, 32 Conn. 278, 85 Am. Dec. 260; *Cox v. Hayres*, 55 Vt. 24, 45 Am. Rep. 583; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *State v. Keefe*, 54 Kan. 197, 38 Pac. 302; *Bullard v. Pear-sall*, 53 N. Y. 230; *Becker v. Koch*, 104 N. Y. 394, 58 Am. Rep. 515, 10 N. E. 701; *Stearns v. Merchants' Bank*, 53 Pa. St. 490; *Collins v. Hoehle*, 99 Wis. 639, 75 N. W. 416.

Evidence offered solely to impeach a party's own witness and which has no other tendency is not admissible: *Nathan v. Sands*, 52 Neb. 660, 72 N. W. 1030; *Harlan v. Green*, 31 Misc. Rep. 261; 64 N. Y. Supp. 79.

Rebuttal Evidence to Sustain the Credibility of a Witness.—Where the reputation or character of a witness for truth and veracity is sought to be impeached, rebuttal evidence is admissible to sustain his character: *Warfield v. Louisville etc. R. R. Co.*, 104 Tenn. 74, 78 Am. St. Rep. 911, 55 S. W. 304; *Alkire Grocer Co. v. Tagart*, 78 Mo. App. 166; *Stape v. People*, 85 N. Y. 390; *Olackner v. State*, 33 Ind. 412; *State v. Nelson*, 58 Iowa, 208, 12 N. W. 253; *Prentiss v. Roberts*, 49 Me. 127; *Sloan v. Edwards*, 61 Md. 89; *Warren v. Com-*

monwealth, 99 Ky. 370, 35 S. W. 1028; *Farmer v. State*, 35 Tex. Cr. Rep. 270, 33 S. W. 232; *Haley v. State*, 63 Ala. 83; *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145. Before a party can introduce evidence to sustain the good character of his witnesses, such character must have been attacked: *Alkire Grocer Co. v. Taggart*, 78 Mo. App. 166; *Bryant v. Tidgewell*, 133 Mass. 86; *State v. Rorabacher*, 19 Iowa, 154; *Hamilton v. Conyers*, 28 Ga. 277. Proof of arrest and confinement in jail is such an attack on a witness' character as will admit of proof of the good character of the witness to sustain his credibility: *Farmer v. State*, 35 Tex. Cr. Rep. 270, 33 S. W. 232. Negative proof is competent to show good reputation; that is, it may be shown that the neighbors of a witness, those having the best opportunity of knowing, have never heard anything said about his character, good or bad: *State v. Nelson*, 58 Iowa, 208, 12 N. W. 253. While, as already stated, the general good character of a witness cannot be shown unless he has been impeached, an exception seems to be recognized in the case of a witness who is a stranger residing in another state. In such case evidence of his good character is admissible to corroborate him: *Merriam v. Hartford etc. R. R. Co.*, 20 Conn. 354, 52 Am. Dec. 344; *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

If the credibility of a witness is attacked by evidence that he has been charged with the commission of a crime, he may in rebuttal prove that he has been acquitted of that charge: *Jackson v. State*, 33 Tex. Cr. Rep. 281, 47 Am. St. Rep. 80, 26 S. W. 194, 622. Where a witness admits on cross-examination that he has been indicted for a crime, he may state, to rebut this, in general terms whether he is guilty or innocent of such crime, and whether he has been tried and acquitted, but he cannot go into details: *Ryan v. State*, 97 Tenn. 206, 36 S. W. 930. And it has been held proper to exclude evidence which would tend to prove that the witness was not guilty of the offenses charged against him: *Whitley v. State* (Tex. Cr.), 56 S. W. 69.

In order to testify as to the good character of a witness whose reputation has been attacked, a witness must be acquainted with the reputation of the impeached witness. His competency to testify in this respect is governed by the same rules as that of the impeaching witness: *Cook v. Hunt*, 24 Ill. 536; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *Gifford v. People*, 148 Ill. 173, 35 N. E. 754; *Haley v. State*, 63 Ala. 83; *Sloan v. Edwards*, 61 Md. 89; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Clay v. Robinson*, 7 W. Va. 348.

Where on the cross-examination of a witness it is shown that the witness had trouble with the deceased, such evidence being admissible to show bias on the part of the witness, such witness is entitled on redirect examination to explain the nature of the trouble for the purpose of removing or lessening the discredit which such

cross-examination tended to produce: *People v. Zigouras*, 163 N. Y. 250, 57 N. E. 465.

If a witness has been impeached by evidence of his bad reputation, evidence in rebuttal is not admissible to show that long prior to the trial he made statements consistent with his testimony: *Mason v. Vestal*, 88 Cal. 396, 22 Am. St. Rep. 310, 26 Pac. 218. Neither can a witness, who has been impeached by disproving the facts testified to by him, be sustained by proof of general good character: *Bell v. State*, 100 Ga. 78, 27 S. E. 669; *McGrath v. State*, 35 Tex. Cr. Rep. 413, 34 S. W. 127, 941.

When the prior inconsistent statements of a witness have been proved for the purpose of impeaching him, the authorities are in conflict both as to whether, to sustain the witness, his good character may be proved under such circumstances, and also as to whether his prior statements which are consistent with his testimony may be shown. Certainly, the witness' testimony cannot be corroborated in either manner if his credibility has not been attacked, since, in the absence of some impeaching evidence, no necessity exists for corroboration in either of these manners: *Baxter v. Camp*, 71 Conn. 245, 71 Am. St. Rep. 169, 41 Atl. 803; *State v. Carter*, 51 La. Ann. 442, 25 South. 385; *Doucette v. State (Tex.)*, 45 S. W. 800; *James v. State*, 115 Ala. 83, 22 South. 565; *Hamilton v. Conyers*, 28 Ga. 277; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *State v. Thomas*, 78 Mo. 327; *Bryant v. Tidgewell*, 133 Mass. 88; *State v. Rorabacher*, 19 Iowa, 154.

The decisions are in conflict as to whether the good reputation of a witness may be proved to sustain his credibility, where he has been impeached by proof of contradictory statements. That his good reputation can be shown for such purpose, see *Touns v. State*, 111 Ala. 1, 20 South. 598; *Haley v. State*, 63 Ala. 83; *Stratton v. State*, 45 Ind. 468; *Morrison v. State*, 37 Tex. Cr. Rep. 601, 40 S. W. 591; *Johnson v. Brown*, 51 Tex. 65; *Burrell v. State*, 18 Tex. 718; *Berryman v. Cox*, 78 Mo. App. 67; *Isler v. Dewey*, 71 N. C. 14; *Glaze v. Whitley*, 5 Or. 164; *Sweet v. Sherman*, 21 Vt. 23; *Prentiss v. Roberts*, 49 Me. 127. As holding that the good reputation of a witness cannot be shown where his prior contradictory statements have been introduced for the purpose of impeaching him, see *Shepard v. Yocum*, 10 Or. 402, overruling *Glaze v. Whitley*, 5 Or. 164; *First Nat. Bank v. Commercial Assur. Co.*, 33 Or. 43, 52 Pac. 1052; *State v. Rice*, 49 S. C. 418, 61 Am. St. Rep. 816, 27 S. E. 452; *Chapman v. Cooley*, 12 Rich. 654; *Stamper v. Griffin*, 12 Ga. 450; *People v. Gay*, 7 N. Y. 378; *Webb v. State*, 29 Ohio St. 351; *Russell v. Coffin*, 8 Pick. 143; *Brown v. Mooers*, 6 Gray, 451; *Wertz v. May*, 21 Pa. St. 274. A mere effort to prove contradictory statements was deemed not such an attack on the character of a witness as to allow proof of his good character in rebuttal: *Gulf etc. Ry. Co. v. Younger (Tex.)*, 40 S. W. 423. And

as has been seen the fact that a witness has, as to his testimony, been contradicted by opposing testimony is not such an impeachment as will permit the credibility of such witness to be sustained by proof of his good character: *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114, 40 S. W. 425; *Murphy v. State* (Tex.), 40 S. W. 978.

The authorities are equally conflicting upon the question whether, if the credibility of a witness is attacked by proof of prior inconsistent statements, corroborative proof is admissible to show prior consistent statements for the purpose of sustaining the credit of the witness. That it is competent to prove the prior consistent statements of a witness for the purpose of corroborating him and sustaining his credit, see *State v. George*, 8 Ired. 324, 49 Am. Dec. 392; *Johnson v. Patterson*, 2 Hawks, 183, 11 Am. Dec. 756; *Jones v. State*, 38 Tex. Cr. Rep. 87, 70 Am. St. Rep. 719, 41 S. W. 638, 40 S. W. 807; *Kimball v. State*, 87 Tex. Cr. Rep. 230, 66 Am. St. Rep. 799, 39 S. W. 297; *Hamilton v. State*, 36 Tex. Cr. Rep. 372, 37 S. W. 431; *Kirk v. State*, 35 Tex. Cr. Rep. 224, 32 S. W. 1045; *Hobbs v. State*, 133 Ind. 404, 32 N. E. 1019; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157; *Rittenhouse v. Wilmington St. Ry. Co.*, 120 N. C. 544, 26 S. E. 922; *Green v. State*, 97 Tenn. 50, 36 S. W. 700; *Lockwood v. Betts*, 8 Conn. 133; *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *State v. Dennin*, 32 Vt. 158; *Wallace v. Grizzard*, 114 N. C. 488, 19 S. E. 760. Evidence given at a former trial may be introduced to sustain him: *Henderson v. Jones*, 10 Serg. & R. 322, 13 Am. Dec. 676. Statements, consistent with his testimony, given at the coroner's inquest or the preliminary examination, are admissible to sustain the credit of the witness where conflicting statements are shown: *Sims v. State*, 36 Tex. Cr. Rep. 154, 36 S. W. 256. In asking a witness as to his former consistent statements, it is not necessary to ask him to whom he made them: *Burnett v. Wilmington etc. Ry. Co.*, 120 N. C. 517, 26 S. E. 819. Where an accomplice has reluctantly made confessions to the police, under the influence of the "sweating process," and such confessions are introduced in evidence to impeach him, evidence is admissible to show statements consistent with his testimony made on other occasions: *State v. Coates*, 22 Wash. 601, 61 Pac. 726. Where an impeaching witness has given his version of a conversation, it is competent to rebut this evidence by testimony of another person who was present and who can testify that the conversation was not correctly repeated: *State v. Mims*, 36 Or. 315, 61 Pac. 888. It is intimated in some of the cases that prior corroborative statements are admissible to sustain a witness only when they are shown to have been made prior to the contradictory statements: See *Jones v. State*, 38 Tex. Cr. Rep. 87, 70 Am. St. Rep. 719, 40 S. W. 807, 41 S. W. 638; *Conrad v. Griffey*, 11 How. 480; *Board of Commrs. v. Vickers* (Kan.), 61 Pac. 391. Such a rule seems to have been expressly announced in *Queener v. Morrow*, 1 Cold. 123. But it is doubtful whether

such a strict rule is applied in practice. And it would seem that if the prior consistent statements were made so near the date of the occurrence as to negative all idea of any motive to misrepresent on the part of the witness, that such statements would be admissible, even though they were in fact made subsequent to his contradictory statements: See *State v. Hendricks*, 82 Kan. 559, 4 Pac. 1050; *Rittenhouse v. Wilmington St. Ry. Co.*, 120 N. C. 544, 26 S. E. 922; *Kirk v. State*, 35 Tex. Cr. Rep. 224, 32 S. W. 1045; *Hamilton v. State*, 36 Tex. Cr. Rep. 372, 37 S. W. 431.

On the other hand, there are many jurisdictions in which the general rule is firmly established that the credibility of a witness cannot be sustained by proof of corroborative statements, where he has been impeached by evidence of prior statements in conflict with his testimony at the time of the trial: See *People v. Doyell*, 48 Cal. 90; *State v. Vincent*, 24 Iowa, 570, 95 Am. Dec. 753; *Stolp v. Blair*, 68 Ill. 543; *McKelton v. State*, 86 Ala. 594, 6 South. 301, overruling *Sonneban v. Bernstein*, 49 Ala. 168; *Reed v. Spaulding*, 42 N. H. 114; *Herrick v. Smith*, 18 Hun, 446; *Connor v. People*, 18 Colo. 373, 36 Am. St. Rep. 295, 33 Pac. 159; *Riney v. Vanlandingham*, 9 Mo. 816; *Dudley v. Bolles*, 24 Wend. 465; *Robb v. Hackley*, 23 Wend. 50; *Loomis v. New York etc. R. R. Co.*, 159 Mass. 39, 34 N. E. 82; *Dufresne v. Weise*, 46 Wis. 290, 1 N. W. 59; *Ware v. Ware*, 8 Me. 42; *Davis v. Kirksey*, 2 Rich. 176. Prior consistent statements are not admissible even if made immediately after the transaction occurred which had been testified to: *Reed v. Spaulding*, 42 N. H. 114. But even in such jurisdictions the rule is subject to a well-recognized exception, where the adverse party has sought to impeach the witness by showing that he was testifying under some motive, and that his account is a fabrication of recent date. In such a case if the prior consistent statements were made before the motive imputed to him could have arisen, then they are admissible in evidence to sustain him: *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307; *People v. Doyell*, 48 Cal. 90; *State v. Vincent*, 24 Iowa, 570, 95 Am. Dec. 753; *Stolp v. Blair*, 68 Ill. 543; *State v. Flint*, 60 Vt. 304, 14 Atl. 178; *Ellicott v. Pearl*, 10 Pet. 412; *Reed v. Spaulding*, 42 N. H. 114; *In re Hesdra's Will*, 119 N. Y. 615, 23 N. E. 555; *Hawley v. Hawley*, 48 App. Div. 301, 62 N. Y. Supp. 671. There must have been some change in relation of the witness to the party or the cause since the early consistent statements were made or they are inadmissible: *Reed v. Spaulding*, 42 N. H. 114. The rule is well stated in the syllabus to *Robb v. Hackley*, 23 Wend. 50, which is frequently quoted: "Where the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in

facts as set forth in the affidavits seeking a recovery on account of the negligence of the agents or servants of appellant in allowing the valise to be stolen.

¹⁵³ Defendant appeared, as shown by written agreement of counsel, in which it was expressly stipulated that by doing so, it did not waive its right to question the jurisdiction of the court, and made several motions to dissolve the attachment and dismiss the suit on the ground that it was a nonresident corporation, and the cause of action arose outside of the state of Alabama, to which motions the court sustained demurrers. Defendant then filed a plea in abatement, in which it averred that it is a corporation organized under the laws of the state of Illinois and resides out of the state of Alabama, and the cause of action upon which this suit was brought arose outside of the state of Alabama, and that the suit is not upon any contract entered into with reference to a subject matter within this state; but that the respective rights of the parties to this suit, so far as they relate to the subject matter thereof, depend upon the laws of the state in which the defendant resides or those of the state in which the cause of action arose. This plea was demurred to and the ground of demurrer assigned was, the record shows, that the action was begun by original writ of attachment, levied on property of defendant within the jurisdiction of the court. The court sustained this demurrer, and this ruling of the court raises, in our opinion, the material question involved in the determination of this cause. It is, Can a foreign corporation's property found in this state be attached and condemned to satisfy a demand growing out of a tort committed by it in another state?

Without legislative enactment, a foreign corporation could not be sued outside of the state of its domicile, for the reason there were no means provided by which service could be had upon it. By the common law, to maintain a personal action against a corporation, there must have been service of process upon the principal officer within the jurisdiction of the sovereignty creating it. The officer upon whom, in the sovereignty of its creation, service could be legally had, binding the corporation, it may be could be found in another jurisdiction, but he was not regarded as carrying with him his official functions, and service upon him there would not bind the corporation: *St. Clair v. Cox*, 106 U. S. 354, 1 Sup. Ct. Rep. 354; *Sullivan v. Sullivan* ¹⁵⁴ *Timber Co.*, 103 Ala. 371, 15 South. 941. To meet and obviate this inconven-

ience and oftentimes injustice, the legislature of this state has enacted statutes by which process may be served upon the agents of foreign corporations doing business in this state. We do not deem it important to a correct decision of this case to review these statutes. They do not materially differ, for the purpose here involved, from those in existence when the case of *Central R. R. etc. Co. v. Carr*, 76 Ala. 388, 52 Am. Rep. 339, was decided by this court. In that case, the learned judge reviewed them at length, and, after an exhaustive examination of cases decided by other courts, held that a foreign corporation, though doing business in this state through its agents located here, could not be held liable by our courts for a tort committed by it in another state. We quote his conclusion in that opinion, as he there so aptly and tersely states the doctrine by saying: "We cannot think that it was the intention of the legislature, in any of the statutes we have been considering, to allow foreign corporations to be sued in this state, except on causes of action originating in this state, or on contracts entered into in reference to a subject matter within this state. To hold otherwise would allow foreign corporations which transact business in Alabama to be drawn into our courts, for the adjudication of every contract they may make, and of every tort and wrong they may be charged with committing, even in the state which gave them being."

This doctrine is reaffirmed in the case of *Louisville etc. R. R. Co. v. Dooley*, 78 Ala. 524, where a resident of this state sued out an attachment against a resident of the state of Kentucky and the only service effected was a writ of garnishment on the *Louisville & Nashville Railroad Company*, a foreign corporation, this court holding that this mode of service can be resorted to only in causes of action originating in this state or on contracts entered into with reference to a subject matter within this state.

The case of *Central R. R. etc. Co. v. Carr*, 76 Ala. 388, 52 Am. Rep. 339, is cited approvingly in the cases of *Richmond etc. R. R. Co. v. Trousdale*, 99 Ala. 394, 42 Am. St. Rep. 69, 13 South. 23; *Louisville etc. R. R. Co. v. Williams*, 113 Ala. 402, 21 South. 938; *Alabama etc. R. R. Co. v. Chumley*, 92 Ala. 317, 9 South. 286. These cases clearly refused the relief sought by the plaintiffs in each because the court was without jurisdiction to hear and determine their causes of action. As being persuasive of the correctness of the interpretation of the legislative intent as declared in *Central R. R. etc. Co. v.*

Carr, 76 Ala. 388, 52 Am. Rep. 339, we call attention to subdivision 2 of section 669 of the code of 1896 (Code 1886, sec. 3414), in which the jurisdiction of courts of chancery is extended as against nonresidents to causes of action arising in this state or the act on which the suit is founded was to have been performed in this state, and the case of *Iron Age Pub. Co. v. Southern Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758, 34 L.R. 449, in which it is construed.

The contention here, however, is that as the property of the appellant was found within the jurisdiction of the court, the attachment being a proceeding in rem, the court had the right to condemn it to the satisfaction of plaintiff's demand. This involved an inquiry into the nature and character of a suit by attachment under our statutes and what it is that gives the court jurisdiction to render a judgment condemning property levied upon under a writ of attachment to satisfy such judgment. Section 535 of the code of 1896 (Code 1886, sec. 2940) provides for process by attachment against foreign corporations having property in this state, for the recovery of debts, or to recover damages for a breach of contract when the damages are not certain or liquidated, or in cases where the action sounds in damages merely, in the same manner and subject to the same rules as in case of natural persons residing without the state. Section 524 of the code of 1896 (Code 1886, sec. 2929) provides for what demands attachments may issue. Section 527 (2932) requires an affidavit before a writ of attachment can issue. Section 525 (2930) provides the cases in which it may issue, one of those being when the defendant resides out of the state. Section 529 (2934) provides for an additional affidavit where the attachment is sued out to recover damages for a breach of contract, when the damages are certain or liquidated or when the action sounds in damages merely. Section 561 (2995) requires a complaint to be filed setting forth the cause of action, ¹⁵⁶ and section 562 (2996) provides the cause shall proceed as suits commenced by summons and complaint.

It is manifest that an affidavit showing for what demands the attachment is issued to enforce and that one of the causes as enumerated in section 525 exists should be required before the issue of the writ of attachment. In the case of *Exchange Nat. Bank v. Clement*, 109 Ala. 270, 19 South. 814, the then chief justice, speaking for the court, discusses at length the nature and character of suits by attachment. He said: "The

theory of an attachment, whether it be process against or to subject the property or effects of a resident or nonresident of the state, as the remedy has been administered in this state, it partakes essentially of the nature and character of a proceeding in personam, and not of a proceeding in rem. The complaint, the primary pleading, is filed in the same form, containing no other averments than are contained in the complaint when the suit is commenced by the issue and service of personal process; and as we have seen, the issues pertaining to the suit are the issues pertaining to a suit in personam. The judgment rendered is general and personal, that the plaintiff have and recover of the defendant; and upon it and for its enforcement any process may issue which can issue upon a personal judgment, and is leviable upon any property of the defendant, the subject of levy and sale to satisfy a judgment: *Betancourt v. Eberlin*, 71 Ala. 464.

"It is apparent the statutes intended an attachment, when the original process, shall serve a double purpose: 1. Giving notice to the defendant to appear and defend; 2. The creation of a lien upon the thing attached, or effects garnished, affording security to the plaintiff, if he succeeds in obtaining judgment."

When, however, there is not a personal appearance by the nonresident defendant, and the levy of the attachment is upon property belonging to him found in this state, the proceeding is in the nature of a proceeding in rem, rather than a proceeding in personam. But, says the learned judge in the case here quoted, "the judgment rendered must correspond to the nature of the proceeding. Of necessity, it must ascertain and declare the amount of the debt, claim, or demand to be enforced by the attachment; and this must be ascertained and declared in the same mode and form as if the suit was in personam. There must follow a condemnation of the property attached or of the effects garnished." This case, in our opinion, so clearly defines the nature and character of a suit by attachment under our statutes that we think it would be superfluous to comment further upon the subject.

The next question for consideration is, What is it that gives the court jurisdiction to render a judgment against the defendant and to condemn his property to the satisfaction of the judgment, or in case there is not a personal appearance by a nonresident defendant, what is it that gives the court jurisdiction to render a judgment to condemn his property upon

which the attachment is levied to the satisfaction of the judgment? Jurisdiction is defined to be "the power of a court or judge to hear and determine a cause": *United States v. Arredondo*, 6 Pet. 691; *Woodruff v. Stewart*, 63 Ala. 206.

In *Lamar v. Gunter*, 39 Ala. 324, the court said: "The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action. But, before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to ascertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained."

Perhaps the definition is more clearly stated for the purposes of this case in *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13, where this language is to be found: "The power to decide upon the cause of action, as presented by the pleadings, is jurisdiction, like the power to decide any other legal proposition which the case may involve."

The remedy by attachment was unknown to the common law and derives its existence from statutory enactment and in consideration of its harshness and extraordinary character, courts are generally, in the absence of any statutory provisions regulating their construction, ¹⁵⁸ inclined to construe the statutory provisions creating it strictly in favor of those against whom it may be employed. And on account of its origin, the jurisdiction of the courts invoked to enforce this remedy is placed upon the same footing with courts of special or limited jurisdiction with no presumptions in favor of their jurisdiction in cases arising under the attachment laws: *Shinn on Attachment and Garnishment*, sec. 8, notes; *Waples on Attachment*, sec. 23, and notes; *Wade on Attachment*, sec. 38.

In *Waples on Attachment*, section 603, the writer, in discussing the question of jurisdiction, says: "The foundation for power to hear and determine the cause is laid by the attachment, but the superstructure is not thus raised. The *sine qua non* of the suit against the property is the seizure, but that alone confers no authority to try the cause. It is, therefore, not true in an unqualified sense, that seizure alone gives jurisdiction in an attachment suit, if the term 'jurisdiction' is used as usually defined—power to try the cause": *Wade on Attachment*, sec. 39, and note; *Shinn on Attachment*, sec. 127.

John D. Works on Courts and their Jurisdiction, section 74, page 519, in treating of attachments, says: "It is a remedy that is incidental to, and which depends upon, the right of the plaintiff to recover a judgment against the defendant, and can only be obtained in connection with, and during the pendency of, an action for the recovery of such judgment or to establish a right thereto and have the property attached applied to the satisfaction of the amount claimed to be due or owing to the plaintiff, and is denominated a provisional remedy."

Without repeating at length what we have heretofore stated, it seems to us, in view of the requirements under the several sections of the code above quoted in substance, namely, that the affidavit must set out the cause of action, a complaint must be filed by the plaintiff, and the cause tried by the court as in suits commenced by summons and complaint, and the judgment must ascertain and declare the amount of the debt, claim, or demand sought to be enforced by the attachment, that the power of the court to decide upon the cause of action as presented by the pleadings, must determine the question ¹⁵⁹ of its jurisdiction. This we have seen does not exist in this case. It would be an anomaly in judicial procedure if defendant could be made liable upon a cause of action by suit in attachment, when it would not be liable in the same court, upon the same cause of action, by suit commenced by summons and complaint upon personal service, because of the want of jurisdiction in the court to hear and determine the cause. We are unwilling to declare such was the legislative intent, in the absence of some expression in the statutes regulating attachment proceedings, strongly indicating such intention to have existed. Especially as such a conclusion is illogical and cannot be maintained upon sound principles of public policy and reasoning.

There was error in sustaining the demurrer to defendant's plea in abatement.

Judgment is reversed and cause remanded.

FOREIGN CORPORATION—SERVICE ON.—At common law jurisdiction of a corporation could not be acquired by service of process on its officers outside of the state that gave it existence: See the monographic note to *Hampson v. Weare*, 66 Am. Dec. 121.

TORT OF CORPORATION—CONFLICT OF LAWS.—The cause of action on a tort or trespass is transitory and follows the offending party, whether a corporation or a natural person, into any jurisdiction where he may be found, and the right of action being personal to the complainant, he may bring it in any court that he may se-

lect: *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 78 Am. St. Rep. 890, 27 South. 851.

ATTACHMENT.—TO OBTAIN JURISDICTION BY ATTACHMENT, the statutory provisions must be strictly pursued: See the monographic note to *Miller v. White*, 76 Am. St. Rep. 800.

HOWSER v. CRUIKSHANK.

[122 Ala. 256, 25 South. 206.]

MORTGAGES—SUBSEQUENT DEED TO PART OF LAND—MARSHALING SECURITIES.—Where a mortgagor, after the execution of the mortgage, conveys different parcels of the mortgaged property to different persons at different times, by warranty deeds, which contain no reference to the existence of the mortgage, the portion of such premises retained by the mortgagor is primarily liable for the whole of the mortgage debt, and must be first sold to satisfy the mortgage; and if this portion proves insufficient, resort may be then had to the parcels conveyed, by selling them in the inverse order of their alienation.

MORTGAGES—SUBSEQUENT DEED TO PART OF LAND—NOMINAL CONSIDERATION.—Where a mortgagor, after the execution of the mortgage, conveys a portion of the mortgaged premises by a warranty deed for a nominal consideration, the grantee has a right to demand that the mortgagee shall first resort to the portion of the land retained by the mortgagor to satisfy his mortgage.

MORTGAGES—DEED TO PART OF LAND—SECOND MORTGAGE—MARSHALING SECURITIES.—Where a mortgagor, who conveys a portion of the mortgaged premises by warranty deed without reciting the existence of the mortgage, such deed being placed on record and the grantee taking possession, subsequently gives a second mortgage upon the residue of the land to one who becomes the assignee of the first mortgage after the execution of the warranty deed, the second mortgagee, having notice of the grantee's equity, acquires only the right which the mortgagor had. The purchase of the first mortgage gives him no greater rights than were possessed by the mortgagee in the first mortgage; hence the grantee in the warranty deed has a right to have the residue of the property included in the second mortgage sold to satisfy the first mortgage before resorting to the portion conveyed in the deed.

MORTGAGES—REDEMPTION—RIGHT OF SUBSEQUENT GRANTEE.—The grantee in a warranty deed of a part of mortgaged premises has the right to redeem from under the mortgage before the foreclosure sale.

Bill by Mary P. Cruikshank against Louis A. Howser. December 10, 1884, Smith and wife executed a mortgage to Fahey, to secure a note for five hundred dollars. March 5, 1889, Smith and wife conveyed a portion of the mortgaged premises to Cruikshank by a deed of bargain and sale, upon a consideration of love and affection and one dollar, with covenants. Cruik-

shank went into possession of this part of the land, and the deed was recorded. January 1, 1892, Fahey assigned the note and mortgage to Howser. Subsequently to the execution of the deed Smith and wife made a second mortgage to Howser, conveying the land not included in the deed to Cruikshank. Howser foreclosed this second mortgage and purchased the property described in it. The land included in the second mortgage was worth more than the balance due on the first mortgage. Complainant offers to redeem by paying the balance due on the first mortgage. The bill prays for a decree that complainant is entitled to redeem the first mortgage from Howser, and, in any event, that Howser be compelled to resort first to the property conveyed by the mortgage other than the lot conveyed to complainant, and that he be restrained from resorting to complainant's lot unless it should become necessary to satisfy the first mortgage. The defendant demurred to the bill, and the demurrer was overruled. Defendant appeals.

Lane & White, for the appellant.

Cabaniss & Weakley, for the respondent.

201 TYSON, J. Unless the case made by the original and amended bills can be differentiated upon principle from the case of *Farmers' Sav. etc. Assn. v. Kent*, 117 Ala. 624, 23 South. 757, in which this court distinctly and clearly recognized the doctrine that where a mortgagor, after the execution of the mortgage, conveys different parcels of the mortgaged property to different persons at different times, by warranty deeds which contain no reference to the existence of the mortgage, the portion of such premises retained by the mortgagor is primarily liable for the whole of the mortgage debt, and must be first sold to satisfy the mortgage, and if this portion proves insufficient, resort may be then had to the parcels conveyed, by selling them in the inverse order of their alienation, there was no error in the decree overruling the demurrers of the bill.

The two facts relied upon by appellant to relieve this case from the influence of this doctrine, are: 1. That the complainant acquired title to a portion of the premises under a warranty deed from the mortgagor, who was her father, reciting a consideration of one dollar paid and natural love and affection; 2. That respondent acquired title to the remaining portion of the premises by mortgage from the original owner, sub-

sequently to the making of the deed to the complainant, which had been foreclosed before the filing of the bill. Pomeroy (3 Pomeroy's Equity Jurisprudence, sec. 1225), in speaking of this doctrine, says: "It is purely of equitable origin, and is not an absolute rule of law; and if the peculiar equitable reasons upon which it rests are wanting, it ceases to operate. Whether it does or does not apply to any particular case may be certainly determined by a careful consideration of the following principles. The doctrine in its full ²⁶² scope and operation primarily depends upon the relation subsisting between the mortgagor or other owner of the entire mortgaged premises, and his grantee of a parcel of the land. This relation, in turn, results from the form of conveyance, which, being a warranty deed, or equivalent to a warranty, shows conclusively an intention between the two that the grantor is to assume the whole burden of the encumbrance as a charge upon his own parcel, while the grantee is to take and hold his portion entirely free."

Testing the deed under which the complainant claims by this principle, let us see if it is of that character as shows conclusively an intention of the grantor to assume the whole of the burden of the mortgage primarily executed by him as a charge upon his portion and complainant to take and hold her portion free from the mortgage lien. The deed is one of bargain and sale, and covenants with the grantee that the grantor is seised in fee simple in the premises, and that they are free from all encumbrances, and that the grantor has a good right to sell and convey the same, and binds him, his heirs, executors, and administrators to warrant and defend the title to the land conveyed to complainant, her heirs, etc., against the lawful claims of all persons. The consideration recited, as stated above, is for natural love and affection and the sum of one dollar, and this is the infirmity pointed out by appellant's counsel and insisted upon which destroys the effects of the covenant and warranty clauses of said deed and deprives it of the character which impresses conveyances under which this equitable doctrine can be invoked. It will be observed that the whole doctrine rests upon the intention of the parties to be gathered from the entire instrument or conveyance. That the consideration expressed in this deed will support it inter sese and their privies as a conveyance can hardly be denied. In *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756, it is said: "In deeds of bargain and sale, the expression of any, the slightest, consideration—for instance, a pepper corn even—will sup-

port them as between the parties. The only use and operation of the expression of a consideration or the introduction of a section of a clause reciting a consideration is to prevent a resulting trust ²⁶³ to the grantor, and to estop him from denying the making and effect of the deed for the uses therein declared." And that the grantee could maintain an action for a breach of warranty against the grantor, in the event of a breach, is also indisputable: 8 Am. & Eng. Ency. of Law, 2d ed., 173; Walker v. Crews, 73 Ala. 412; 2 Devlin on Deeds, sec. 810. The measure of her recovery for such a breach is not, in our opinion, the test by which the question under consideration is to be determined. It would seem that, from the plain words of the deed, complainant has a right to invoke this equity of exoneration, unless there is some impediment arising out of the relations of the respondent to the transaction rendering it inequitable for her to do so. Does the fact that the respondent became the owner of the first mortgage by transfer and assignment after complainant acquired the deed, and, subsequently to the execution of the deed, her grantor executed to the respondent a mortgage upon the residue of the lands to the respondent which he has foreclosed, in any manner impair her equity? It is against the holder of the first mortgage that this equity exists, and by what process of reasoning it may be said to be cut off by the second mortgage of a portion of the premises acquiring the title of the first mortgagee, we are unable to perceive. She was in no sense a party to the assignment or in anywise interested in it. It was a matter of indifference to her who was the owner of the first mortgage, and of no consequence to her who held it. As to the rights of the respondent under the mortgage made to him upon the residue of the property, he acquired no greater rights than he would have acquired under a deed from the mortgagor. By this mortgage the mortgagor conveyed his equity of redemption subject to all equities between him and complainant of which respondent had notice, either actual or constructive. The complainant being at the time in the possession of the land conveyed to her, and the deed under which she held then being of record, the respondent had notice of her equity when he took the mortgage: 3 Pomeroy's Equity Jurisprudence, sec. 1225, and note; Northwestern Land Assn. v. Harris, 114 Ala. 468, 21 South. 900; 2 Jones on Mortgages, 5th ed., sec. 1620; 2 Lead. Cas. Eq. 297.

²⁶⁴ Having notice of complainant's equity when he took the mortgage, and when he purchased the property at the fore-

place of business in the city of Huntsville, and carrying on the business of a building and loan association, as averred in the bill and admitted by the answers, upon the plan usually adopted by such associations. The shares were of the "par or maturity ³³⁵ value" of fifty dollars each, and were evidenced by a certificate executed by the corporation, bearing date the fourth day of October, 1890. Under the rules and regulations adopted by the corporation, which, by express terms, became a part of the contract of membership, each shareholder was required to pay monthly in advance thirty-five cents for each share held by him, and any shareholder failing or neglecting to pay his monthly installments for a period of three months "forfeits his shares." These rules and regulations further provide that if a member dies, his personal representatives may withdraw his shares at any time, if they should elect to do so, and be entitled to receive the money paid into the "loan fund" on such shares, together with interest at the rate of six per cent per annum; and, further, that upon making seventy-two payments, the shareholder, or his personal representative, may withdraw and, upon such withdrawal, he would become entitled to a certain percentage of the profits which the association had earned from the date of the issue of the certificate to the date of the seventy-second payment. At the time of his death, the decedent had made sixty-seven payments, and, at that time, the withdrawal value of his certificate was nine hundred and sixty dollars and eighty cents. On the eighteenth day of September, 1896, Amanda L. Robertson was appointed administratrix of the decedent's estate by the court of ordinary in and for Fulton county, in the state of Georgia, and as such administratrix she became possessed of the certificate for the forty shares of stock, and, soon after her appointment, paid to the Southern Building and Loan Association the sum of thirty-five dollars, which, added to the payments made by the decedent in his lifetime, made the number of payments upon the stock seventy-two, thus entitling the holder, upon withdrawal, to a given percentage of the profits earned, under the rules and regulations above referred to. She completed this payment in January, 1897, and applied for a withdrawal, surrendering to the association the certificate of stock, and the pass-book, as required by the rules and regulations; and on the thirtieth day of March, 1897, the association wrote her a letter, stating ³³⁶ that "her application is on file and will be paid in its order." After completing the seventy-two payments, the

withdrawal value of the shares was twelve hundred and forty-nine dollars and ninety-two cents. On the thirtieth day of March, 1897, John W. Grayson was appointed administrator of the decedent's estate by the court of probate of Madison county, in this state, and on the same day filed with the association an application for withdrawal, and demanding that the withdrawal value of the shares be paid to him. It seems from the correspondence read in evidence that this application and demand were made before the association wrote the letter above mentioned, stating to Mrs. Robertson, or her attorneys, that the application was on file and would be paid in its order. It may be added that the rules and regulations of the association provide that the maturity or withdrawal value of shares is payable at the home office in the city of Huntsville. Thereupon, the bill in this cause was filed by the association against both of the administrators of Scipio H. Robertson, deceased, praying, among other things, that they might be required to interplead, and that their respective rights to the fund in question might be determined. Both defendants answered the bill, and, upon final hearing, had upon pleadings and proof, a decree was entered by the court below, declaring that Amanda L. Robertson, as administratrix, was entitled to the fund, and ordering the same, less costs and certain expenses, to be paid to her; and from that decree this appeal was taken by John W. Grayson, the ancillary administrator.

While it is true that the personal assets of a decedent, though situate in different jurisdictions, constitute but one estate, and must be distributed according to the law of the domicile at the time of his death, it is equally true that letters testamentary or of administration, granted by a foreign state or country, having no extraterritorial operation, do not, as a matter of right, confer title to, or authority over personal assets found without the jurisdiction from which the grant is derived. In the absence of statutory provision, enabling in its nature, a personal representative, as such, has not the capacity to sue for ³³⁷ the recovery of assets belonging to the estate of his decedent in any other state or country than that from which the letters were derived. In order to collect and administer such assets, there must be, in the absence of statutory provision ancillary administrations in the different jurisdictions in which such assets may be found; such administrations, when granted, drawing to them the title to, and immediate right to the possession of, the assets, although the residuum, after the

satisfaction of claims of residents, goes to the domiciliary administration for distribution. Such is the doctrine of the common law, as repeatedly recognized and declared by this court: *Hatchett v. Berney*, 65 Ala. 39; *Barclift v. Treece*, 77 Ala. 528. Our statute, in recognition of that comity which should prevail among the different states, has given authority to a personal representative appointed in another state, to maintain suits and recover or receive property belonging to the estate of his decedent, and situated in this state; but the authority thereby given is not absolute, but qualified; before he has the right to exercise such authority, he must comply with the conditions prescribed by the statute: Code 1896, sec. 359. This statute is not only permissive, but it is also prohibitory; permissive, upon the compliance with its conditions; prohibitory, in the absence of such compliance: *Hatchett v. Berney*, 65 Ala. 39. Under the construction placed upon the statute by this court nearly forty years ago, the right thus conferred upon a foreign administrator or executor may be defeated by the appointment of a personal representative in this state before the former has reduced the assets to possession: *Bradley v. Broughton*, 34 Ala. 694, 73 Am. Dec. 474. In conferring authority upon executors or administrators deriving their office from foreign appointment, not enjoyed under the common law, the spirit of comity is manifest; but in the qualifications placed upon this authority, as well as in also placing qualifications upon an unqualified authority previously existing at common law, the intention to jealously guard and protect the rights of citizens of the state, interested in the decedent's estate, is equally manifest and pronounced.

²²⁸ We do not understand, however, that these principles, as general propositions, are controverted by the counsel for the appellee. Recognizing them as settled principles of law, as we understand his position, he seeks to remove the right asserted on behalf of his client in this case from their influence by the contention: 1. That while these principles are correctly stated in their application generally to personal assets, they do not apply to the shares of the capital stock of a corporation, because of the provisions of section 1264 of the code of 1896; and 2. That even if they did originally apply to such shares, the payments made by his client upon these shares of stock belonging to the decedent's estate, thus increasing the withdrawal value of the shares, the filing of the application for withdrawal with, and the surrender of the certificate to, the

association, and the promise of the association to pay the withdrawal value to his client, effected a novation, rightfully and lawfully made, thus conferring upon her the title to the shares, and the right to collect the withdrawal value thereof; or, as otherwise expressed by him, operated to merge the stock in a contract lawfully made by the association with his client. To neither of these propositions can we yield our assent. The statute which is relied on in support of his first contention reads: "An executor or administrator, deriving his appointment from a court of probate of this state, or, if the testator or intestate resided without the state, from the proper tribunal of his domicile, may transfer the shares of stock held and owned by such testator or intestate in any private corporation existing under the laws of this state; payments of dividends on such stock may be made to such executor or administrator": Code, sec. 1264. Whether this statute intended to confer upon the foreign personal representative the power to transfer shares of stock in the corporation mentioned, and to receive dividends therefrom, without a compliance with the terms of section 359 of the code, it is not now necessary to decide; for it is clear that the legislature, in enacting this statute, did not intend to confer these powers on both resident and foreign representatives, where domiciliary and ancillary administrations had been ^{also} granted, making them coexistent, leaving it to a race of diligence between them as to which should exercise the powers; nor was it thereby intended to give any preference to the foreign over the domestic personal representative. The same statute gives the same powers to both, to be exercised by the one or the other according to their respective rights as declared by law. Whatever authority over the personal assets of a decedent situated in this state a foreign executor or administrator may have prior to the grant of letters by a competent court of this state, that authority ceases upon such appointment. Upon such appointment the title to all personal assets in this state vests in the person so appointed, and he is clothed with all powers incident to the administration of such assets; and this title and these powers are exclusive, leaving in the foreign and domiciliary personal representative only the right to receive the residuum of the estate upon the final settlement of the domestic or ancillary administration: *Hatchett v. Berney*, 65 Ala. 39; *Winter v. London*, 99 Ala. 263, 12 South. 438. In the last case cited, section 1264 of the code was before this court for consideration,

and Haralson, J., speaking for the court in respect to this section, said: "But the same section confers the same power and authority on an executor or administrator, deriving his appointment from a court of probate in this state." If there is any conflict between the provisions of this section, "it is our duty to construe them in *pari materia*, and make them both operative, if such construction can be placed upon them. There is, however, no conflict between them. The latter section merely provides for the transfer of stock by a foreign executor or administrator when there is no administration in this state. It does not deny the same right to an administrator appointed here. It is simply cumulative, in extending this authority to a foreign executor or administrator." It follows, therefore, that even assuming the power to transfer the shares of stock in, and to receive dividends from, corporations organized under the laws of this state, conferred by the statute, includes the power to receive from the complainant the withdrawal value of the decedent's shares, such power was ³⁴⁰ intercepted and defeated by the appointment of the defendant Grayson as administrator by the court of probate of Madison county. But we cannot concede that the powers given by the statute include the powers here contended for; on the contrary, we are of the opinion that they do not. Two powers, and only two, are conferred by the statute—the power to transfer shares and the power to collect dividends. The power to transfer, including, it may be, the power to sell, and the power to receive dividends, are, it may be admitted, strong indicia of ownership, and if used in other relations might be taken as conferring all rights and powers pertaining to ownership; but given as they are to personal representatives, and construed in the light of the common law and of other statutes, defining and declaring the rights and powers of such representatives over the personal assets belonging to decedents' estates, we are unwilling to give them such a broad construction, but rather to limit them to the restricted import of the language of the statute. In this case there was no transfer or attempted transfer of the shares; nor is the collection of dividends involved.

The shares in a building and loan association and the rights of the holders thereof are peculiar and *sui generis*, differing in essential particulars from shares and the rights of shareholders in other business corporations. In the case under consideration the shares seem to be divided into classes, and

the by-laws and regulations of the association provide for the maturity of these shares, and at their maturity the association agrees to pay a sum definite, in extinguishment of the rights of the shareholders; and these by-laws and regulations, as heretofore shown, provide for the withdrawal from membership, upon the death of the stockholder, the association agreeing in such event to pay a certain sum, based on the amount the decedent had paid and interest thereon at six per cent per annum; and they further provided for the withdrawal, upon making seventy-two payments, by the shareholder himself, or, upon his death, by his personal representative, the association in such event agreeing to pay a certain sum, based on his proportion of certain profits earned by the association during his³⁴¹ membership. In either case, upon such withdrawal, and upon a compliance with the by-laws and regulations, by surrendering the certificate and pass-book, the association thereby, and eo instanti, becomes indebted to the shareholder in the amount provided for by its by-laws and regulations; and upon the payment of that sum the relation of shareholder and corporation ceases, and the rights of the shareholder in the assets and management of the corporation are extinguished; and for the amount of such indebtedness an action of assumpsit would lie against the corporation. Therefore, whether before the withdrawal the shares are to be considered as mere choses in action or not—as to which question there is much contrariety of opinion in the adjudications of the courts—after the withdrawal, the right of the shareholder does become a mere chose in action, controlled by the principles of law, and enforceable by the remedies applicable to such species of property. The appellee, as administratrix, upon her appointment, no administrator having then been appointed in this state, had, doubtless, the right to withdraw and thus fix the amount owing by the association to the estate of her decedent according to the regulations of the association, based upon the payments which he had made in his lifetime, or to pay to the corporation a sum of money sufficient to make seventy-two payments; thus, under the regulations of the association, increasing the amount coming to the estate represented by her. In either event the effect of her act was merely to fix the amount which the corporation owed upon the shares held by her intestate, and to terminate his liability for further payments and his right to participate in the future profits earned by the association. It appears from the evidence that the shares continued to stand

on the books of the company in the name of the deceased; and no express change of ownership whatever is shown, and none results by implication of law from the acts and conduct of the parties. Such being the case, it cannot be said that there was any novation, or any merger of the rights of the estate in any contract made by the appellee with the association entitling her to a recovery of the withdrawal value of the shares. ³⁴² Whatever sum she expended in enhancing the withdrawal value of the shares she may be entitled to recover from the Alabama administration in appropriate proceedings, or upon appropriate pleadings in this case; but such expenditure cannot affect the rights of Grayson, as the administrator appointed in this state, to collect from the association the withdrawal value of the shares.

The fact that the appellee came into the possession of the stock, and afterward surrendered the same to the association upon her application for withdrawal, is unimportant in determining which of the administrators is entitled to the fund in question. A certificate of stock is merely the evidence of ownership; the situs of the interest which it represents, for the purposes of administration, must be in the state in which the corporation was organized and has its place of business. It is the situs of the corporation, not the domicile of the holder of the certificate, that determines. Such was the ruling of the supreme court of Tennessee in a case involving the attachment of shares of stock in a foreign corporation; and we think the reasons are more cogent for applying the principle to the facts in this case: *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; 2 Beach on Private Corporations, sec. 633. The surrender of the shares was necessary, under the rules and regulations of the association, to the withdrawal, and it was surrendered to perfect such withdrawal, and the rights of the estate, and the liability of the association resulting therefrom. We cannot see that it has any further significance. It certainly could not, and did not, operate a change of ownership in the shares, or affect the right of recovery of their withdrawal value by the appellant. Before the money was paid to the appellee, whatever rights she may have had to the stock or to the withdrawal value thereof were intercepted and defeated by the appointment of the appellant.

The view which we have been constrained to take of the case renders it unnecessary to pass upon the other assignments of error.

³⁴³ The decree of the chancery court, in so far as it adjudges that the appellee Robertson is entitled to the fund in question, and orders the payment thereof, less costs and expenses, to her is erroneous; and it is therefore reversed. The cause remanded for further proceedings in conformity with this opinion.

The foregoing opinion was prepared by former Chief Justice Brickell.

LETTERS OF ADMINISTRATION CONFER NO EXTRATERRITORIAL AUTHORITY, and have no extraterritorial effect. The authority of a domiciliary executor or administrator does not extend to property in a foreign jurisdiction nor to doings of the executor or administrator there: See the monographic note to Shinn's Estate, 45 Am. St. Rep. 671, 672. An administrator appointed in one state can maintain no action in another unless authorized by statute: Louisville etc. R. R. Co. v. Brantley, 96 Ky. 297, 49 Am. St. Rep. 291, 28 S. W. 477.

AN ANCILLARY ADMINISTRATION IN ONE STATE is not impaired or abridged by a previous grant of administration in another state. If there is a residue in the hands of an ancillary administrator after the payment of debts, it is his duty, in the absence of special reasons for a different course, to remit the same to the domiciliary administrator: See the monographic note to Goodall v. Marshall, 35 Am. Dec. 486, 488.

THE SITUS OF STOCK IS DETERMINED by the situs of the corporation itself, without regard to the locality of the stock certificates: Young v. South Tredegar Iron Co., 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202. But see Greenleaf v. Board of Review, 184 Ill. 226, 75 Am. St. Rep. 168, 56 N. E. 295; monographic note to Buck v. Miller, 62 Am. St. Rep. 450, 458.

WESTERN UNION TELEGRAPH CO. v. CHAMBLEE.

[122 Ala. 428, 25 South. 232.]

TELEGRAPH COMPANIES—DUTY OF SENDER OF MESSAGE—PROTECTION FROM LOSS.—The sender of a telegraph message is under no obligation to protect himself from loss on account of the negligence of the telegraph company, where it does not appear that he knew that he could protect himself.

TELEGRAPH COMPANIES—REPEATING MESSAGE FOR SENDER.—The sender of a telegraph message is under no duty to ascertain whether or not the sendee of the message has received it correctly.

TELEGRAPH COMPANIES—DUTY TO SEND MESSAGES. A telegraph company, in accepting a message for transmission, is under obligation to transmit it correctly and without delay, though it is not an insurer against all accidents.

rectly transmit a message, by showing that the message delivered was not a copy of the one sent, when defendant must exonerate itself by showing that the breach was not due to negligence on its part: *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4; *Gray on Communications by Telegraph*, secs. 26, 53, 77; *Shearman and Redfield on Negligence*, sec. 542; 3 *Sutherland on Damages*, sec. 957; *Thompson on Negligence*, 837.

The demurrer to the fourth plea was properly sustained.

3. Issue was joined in the case on the plea of the general issue, and on the fifth and sixth pleas; the fifth setting up that the contract sued on was founded on a gambling consideration, and the sixth that the contract sought to be made by the plaintiff with the Birmingham Exchange ^{and} Company, the sendee of the message, was a contract founded on a gambling consideration, and was illegal and void. What the evidence introduced on the trial was we are not informed by bill of exceptions. In the motion for a new trial we are informed that the cause was tried before a jury by the plaintiff on evidence adduced to prove his case, in the absence of defendant's counsel. Judgment was rendered for plaintiff for the sum of one hundred and twenty-two dollars and sixty-five cents and costs.

The defendant afterward moved the court for a new trial, which was overruled. The cause is here on bill of exceptions reserved on the trial of that motion. It is based on the ground that the attorneys for the defendant were absent by alleged unavoidable delay in consequence of being engaged in the trial of two causes in Birmingham, one in the federal and the other in the city court in that city, and on the ground that plaintiff ought not to be allowed to recover, on account of the gaming transaction in which he was engaged in sending his messages.

In the first place, we may dispose of the latter question by stating that the messages sent by plaintiff to his correspondent in Birmingham over defendant's line do not conclusively reveal an intention on the part of plaintiff to deal in what are termed "futures." Such contracts, as the authorities generally concur in holding, are valid, though the vendor neither has the goods in hand nor has contracted for the purchase of them, and has no expectation of acquiring them otherwise than by their purchase at some date before the day of delivery. But if it is apparent that no purchase and delivery were intended, but that the transaction should be closed up on the basis of the market

value of the goods at the date of delivery, the losing party paying the other the difference, it is a gambling transaction; it is contrary to public policy and void at common law, in the absence of a statute even denouncing it as such: *Hawley v. Bibb*, 69 Ala. 52; *Lee v. Boyd*, 86 Ala. 283, 5 South. 489. The demurrers to the fifth and sixth pleas were withdrawn and issue taken on them. It may be, in a suit of this character, they were subject to demurrer; but this question is not before us, and we, therefore, do not decide it.

⁴³⁷ 4. The law firm employed by defendant to defend its suit consisted of three members, all residing in Birmingham. The case was originally set for trial on October 26, 1897, but by an agreement of counsel on both sides and with the consent of the court it was reset for November 3d, following. The attorneys for defendant did not appear at Decatur on the last day named. One of them telegraphed on the 2d to the clerk of the court in Decatur: "We are engaged in United States court. Pretty sure can be in Decatur Friday or Saturday"; requesting the clerk to show the message to Mr. Brown, attorney for plaintiff, and have case passed to Friday or Saturday. The clerk replied same day that Brown was not there and judge refused to make order in his absence. Brown lived in Hartselle, Alabama. On the 3d, the same attorney telegraphed to Brown in Decatur. "If case reached please pass until to-morrow. Our firm engaged in city and United States courts. If I cannot come will send some lawyer in my place. If case will not be reached to-morrow, wire me to-day." To this Brown replied: "Telegram received after case was disposed of this forenoon. Judgment against defendant for about one hundred and twenty dollars." Defendant's attorney then telegraphed to Brown or Judge Speake, expressing surprise at the taking of the judgment after seeing his telegram, and stating that he would be up that night with his witnesses, ready to try the case, and requesting Brown to keep his witnesses there or get them back, if they had gone. To this Brown replied: "Witnesses are gone. Heard nothing of your telegram until my client and witnesses were here ready and demanding trial. Big damage suit against Morgan county on trial, which will last several days."

It is not shown that defendant's counsel attempted to have either of their cases in the city or federal court laid over, in order that one of them might go to the Decatur court to try this cause, which had been previously set by their consent on the 3d of November. Reasons are stated why one of the counsel en-

gaged in the city court case was needed to try that cause, and another to try the cause in the federal court, but no facts are shown why it was necessary that the third one should remain in Birmingham ⁴³⁸ on account of either of said causes, further than the expression of a conclusion that it was necessary for him to do so. It is not shown why defendant's counsel, when apprehensive of a conflict in the trials of their causes in Birmingham and at Decatur, did not communicate with plaintiff and his attorney, Brown, both of whom lived at Hartselle, before the latter left home to come to Decatur to try said cause, and attempt to make arrangements for the postponement of this cause. It appears they presumed it would be done as a matter of courtesy, and they delayed timely effort to effect such an arrangement. The attorney of defendant, who did the correspondence by wire, in one of his messages to plaintiff's attorney, stated that if he could not come at a certain time, if the case was laid over till then, he would send another attorney to represent him. He does not show that he might not have done this and had the case tried when set. It also appears there were other capable lawyers living in Decatur, who had no connection with this case, who, for aught appearing, could have represented defendant. It was the duty of defendant or his attorneys to have made some arrangement for the trial of the cause, by the appearance of one of them, or by a suitable representative for the purpose, and not to have depended on a courtesy to be shown them by opposing counsel, especially when it would have been at considerable expense to his client to do so. We will not attempt to deal with the question of courtesy between opposing counsel. The judge who tried this cause, sitting as a fair arbiter in the premises, with all the facts before him, decided that it was not his duty to grant a new trial, and we are unable to hold that he erred in so doing. This conclusion is fully justified by previous decisions of this court: *Brock v. South & North Ala. R. R. Co.*, 65 Ala. 79; *Broda v. Greenwald*, 66 Ala. 538; *McLeod v. Shelly Mfg. etc. Co.*, 108 Ala. 81, 19 South. 326.

Affirmed.

TELEGRAPH COMPANY.—A STIPULATION ON THE BACK of a telegram that the company shall not be answerable for mistakes or delays unless the message is repeated is invalid: *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361, 38 S. W. 1068; *Western Union Tel. Co. v. Beala*, 56 Neb. 415, 71 Am. St. Rep. 682, 76 N. W. 903. Compare *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153, 63 Pac. 83.

IT IS THE DUTY OF A TELEGRAPH COMPANY accurately to transmit and deliver a message received for transmission, but it does not insure the accurate transmission and delivery of the same: *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534; *Western Union Tel. Co. v. Munford*, 87 Tenn. 190, 10 Am. St. Rep. 630, 10 S. W. 818.

CONTRACTS FOR THE SALE OF FUTURES are void, unless there is a bona fide intention that the article contracted for shall be actually delivered and received: *Gist v. Western Union Tel. Co.*, 43 S. C. 344, 55 Am. St. Rep. 763, 23 S. E. 143; *Assigned Estate of Taylor*, 192 Pa. St. 304, 73 Am. St. Rep. 812, 43 Atl. 973. But to invalidate such contract it must appear that no delivery was intended: *Jamieson v. Wallace*, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762.

MORRIS v. EUFAULA NATIONAL BANK.

[122 Ala. 580, 25 South. 499.]

CHECKS—PRESENTMENT—LIABILITY OF DRAWER.—To charge the drawer of a check, the holder is required to present it within a reasonable time, and after the lapse of a reasonable time from its delivery by the drawer, the holder retains it at his peril.

CHECKS — PRESENTMENT — WHEN DRAWER DISCHARGED.—As between the holder and the drawer of a check, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer unless loss to him has resulted.

BANKS—COLLECTION AGENTS—RECEIVING CHECK AS PAYMENT.—Where a bank, which receives a draft for collection, takes a check instead of money in payment thereof, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the collecting bank thus retaining the check and postponing presentment, as between him and the persons in interest whom he represents.

BANKS—COLLECTING AGENTS—RIGHTS, HOW DETERMINED.—As between the drawer or owner of a draft and the party charged with the duty of collecting it, the question of their relative rights is to be determined by the rules of law applicable to principal and agent.

CHECKS—DRAWER AND PAYEE, RIGHTS OF.—As between the drawer and the payee of a check, the question of their respective rights and liabilities is to be ascertained by the commercial law.

CHECKS — PRESENTMENT.—THE REASONABLE TIME allowed the holder of a check for presenting it, when he receives it in the same place where the bank on which it is drawn is located, is till the close of banking hours on the next secular day.

BANKS — COLLECTING AGENT — PRESENTMENT OF CHECK.—A bank which, in payment of a draft held by it for collection, receives a check upon a local bank, which it does not present for payment until the following day, does not thereby become

liable to the drawer of the check by reason of a failure to present it with proper and reasonable diligence.

PLEADING—DEMURRER FOR MISJOINDER—CASE AND ASSUMPSIT.—It is not allowable to join a count in case with one in assumpsit, and such defect may be taken advantage of by a demurrer for a misjoinder of counts.

G. L. Comer, for the appellant.

S. H. Dent, Jr., for the respondent.

586 PER CURIAM. A draft had been drawn by the Mound City Distilling Company on the plaintiff, Morris, and duly accepted by him. It was due on March 30, 1891, and was held by the defendant, the Eufaula National Bank, for collection. The latter made due presentment of it to the drawee and acceptor thereof for payment on March 30th, and received from him a bank check drawn by him for the amount due on the accepted draft, on the John McNab Bank, another banking institution then doing business at Eufaula, Alabama, where the payee thereof was located. The check dated March 30th was payable to the Eufaula National Bank and was delivered about 10 o'clock in the forenoon. The John McNab Bank continued to pay checks drawn on it and presented during the remainder of the day of March 30th, and having then closed its doors did not thereafter resume business operations. The plaintiff had funds on deposit with the drawee sufficient to meet the check which would have been paid if presented within banking hours on the day it was delivered to defendant. On March 31st, the John McNab Bank being then closed, the plaintiff took up his check and paid defendant the amount called for therein, four hundred and seventy dollars and twenty-two cents. The first amended count from which the above facts appear states that the plaintiff "was compelled" by the defendant to take up the check, and we, therefore, assume that it was taken up and the amount paid on the insistence of the defendant that it should be done.

The plaintiff afterward brought his action against the defendant wherein he claims damages on account of **587** the failure of the defendant to present the check on March 30th.

A check is payable on presentation and demand. To charge the drawer, the holder is required to present it within a reasonable time, and after the lapse of a reasonable time from its delivery by the drawer the holder retains it at his peril: *Industrial Trust etc. Co. v. Weakley*, 103 Ala. 458, 49 Am. St. Rep.

45, 15 South. 854; Watt v. Gans, 114 Ala. 264, 62 Am. St. Rep. 99, 21 South. 1011.

As between the holder and drawer of the check, however, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer unless loss to him has resulted: Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763; 2 Daniel on Negotiable Instruments, sec. 1587; Industrial Trust etc. Co. v. Weakley, 103 Ala. 458, 49 Am. St. Rep. 45, 15 South. 854.

Without questioning these general principles, it was held on the former appeal in this case (Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 South. 11), that the amended complaint showed a cause of action. The conclusion of the court was reached upon a distinction, therein pointed out, as being established by the authorities cited in the opinion. In illustrating the proposition announced by him (2 Morse on Banks and Banking, sec. 421), quoted in our former opinion, that learned author was not as lucid as he usually is, but the proposition itself is clear. He thus states the same doctrine in section 240: "But when a check is taken, instead of money, by one acting for others, a delay of presentment for a day, or for any time beyond that within which with proper and reasonable diligence it can be presented, is at the peril of the party retaining the check and postponing presentment, as between him and the persons in interest whom he represents. And where loss occurs because such a check is not presented on the day of its reception, the agent is liable." The same doctrine is thus stated by Mr. Daniel: "The allowance of a day to present the check does not extend to an agent who receives one for a debt of his principal. He must present it instantaneously": 2 Daniel on Negotiable Instruments, sec. 1590.

The authority cited by each of these text-writers is Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690, Mr. Daniel citing in addition, Farwell v. Curtis, 7 Biss. 165, Fed. Cas. No. 4690, and First Nat. Bank v. Fourth Nat. Bank, 17 Hun, 332. As the case of ⁵⁸⁸ Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690, 52 N. Y. 546, is cited as sustaining the conclusion of the court in this case on the former appeal, it is proper to make a fuller statement of it than we would otherwise feel called on to do.

The plaintiffs in that case brought an action to recover the unpaid balance of the price of a bill of goods sold by the plaintiffs to the defendants. The defendants set up a defense of payment by a draft for two thousand nine hundred and sixty-eight dollars and sixty-nine cents, drawn by them on James K. Place

& Co., of New York, to the order of plaintiffs, who resided and did business in New York, the defendants residing at Buffalo. The plaintiffs received the draft by mail on the morning of November 19th, and immediately indorsed it and at about half past one in the afternoon of the same day presented it for payment at the counting-house of James K. Place & Co., the drawees, who were merchants in New York in good standing. In payment of the draft James K. Place & Co. gave their check on the Manufacturers' National Bank of New York city to the order of plaintiffs for the full amount. At the time plaintiffs received the check of James K. Place & Co., the latter had funds in the Manufacturers' Bank to meet the check which would have been paid, had it been presented on that day. The check was deposited during the same afternoon in the Citizens' Bank for collection and was not presented for payment at the Manufacturers' National Bank till 12 o'clock the next day, on the morning of which James K. Place & Co. had failed, and on that account payment of the check was refused.

The action, therefore, was between parties to the original draft, and was not between the parties to the check which James K. Place & Co. had given to plaintiffs. The court, in its opinion, says: "When a check is taken instead of money by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest whom he represents": *Smith v. Miller*, 43 N. Y. 176, 3 Am. Rep. 690.

In *First Nat. Bank of Meadville v. Fourth Nat. Bank*, 580 17 Hun. 332, 77 N. Y. 320, 33 Am. Rep. 618, it appeared that the Meadville Bank had forwarded to the Fourth National Bank a sight draft drawn by another bank in Meadville on certain bankers in New York. On receipt of the draft, the Fourth National Bank presented it to the drawees for payment, who gave their check on another New York bank for the amount and the draft was delivered to them. The Fourth National Bank did not present this check for payment on that day, but sent it through a clearing-house and it was presented the next day for payment, but payment was refused—the drawers of the check having failed on that day. The Fourth National Bank thereupon returned the check to the drawers, received back the draft, made formal demand of payment and caused the draft to be protested for nonpayment, and on the next day due notice

of protest was served by mail upon plaintiffs and upon the drawer of the draft. The action was brought by the Meadville Bank against the Fourth National Bank to recover damages resulting from alleged negligence on the part of defendant in the performance of its duty, as agent for plaintiff. It was held that it was the duty of defendant to have presented the check for payment, as soon as, with reasonable diligence, it could, and for any damages arising from the delay in presentation it was liable.

This case, it will be observed, was between the drawer or owner of the draft and its agent for collecting the same. The question presented in *Farwell v. Curtis*, 7 Biss. 165, Fed. Cas. No. 4690, so far as it bears on the point under discussion was of the same general nature as that in *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690, 52 N. Y. 546, which was there cited and approved.

If the Mound City Distilling Company were suing the Eu-
faula National Bank for accepting the check of the drawee of
the draft and thereby causing loss to it, the cases referred to
would be in point, but that is not the case presented by the
record before us. And that the court in *Smith v. Miller*, 43 N. Y.
171, 3 Am. Rep. 690, 52 N. Y. 546, did not intend that its
language or decision should be construed to apply to the relative
rights of the parties to the check itself, drawn by James K.
Place & Co., is apparent from its language just preceding that
above quoted, the court saying: "But a ⁵⁹⁰ check is payable in-
stantly, and as between the drawer and drawee, the latter has,
in analogy to the rules applicable to inland bills of exchange,
until the day after the receipt of a check to present it for pay-
ment, when drawn on a bank in the same place where given and
received. But," continues the court, "the duty of the plaintiffs
is not determined by that rule of commercial law. That rule
has respect only to the contract and liability of parties to the
instrument." And we may say further that in *Syracuse etc.*
Ry. Co. v. Collins, 3 Lans. 29, 57 N. Y. 641, the question de-
cided in *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690, 52
N. Y. 546, is clearly pointed out. There the defendant had
given the plaintiff a check on a local bank for the amount of
freight bills, on May 4th. The bank on which it was drawn
failed on the 5th, and the check was not presented or paid.
The action was for the amount of the freight bill, for which the
check had been given. The court held that there was no laches
in not presenting the check before the bank closed, as the plain-

tiff had the whole of the next day after receiving it (i. e., of the 5th) in which to present it. And referring to *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690, 52 N. Y. 546, distinguished it in the particular above pointed out, namely, that that case was not disposed of upon the rules of law regulating the rights and duties, respectively, of the drawer and drawee of a check, but upon the rules applicable to one who takes a check for collection, acting for one not a party to it.

The distinction, therefore, to be drawn from the foregoing authorities is this: That as between the drawer or owner of the draft, on the one hand, and the party charged with the duty of collecting it, on the other hand, the question of their relative rights is to be determined by the rules of law applicable to principal and agent; and that as between the drawer and the payee of a check, given under the circumstances and for the purpose shown in this case, the question of their respective rights and liabilities is to be ascertained and fixed by the principles of commercial law. The defendant here, in collecting the draft, was the agent of the drawer thereof, and in no proper sense can it be said to have been the agent of the plaintiff: 1 *Morse on Banks and Banking*, ⁵⁹¹ sec. 214; *Dodge v. Freeman's etc. Trust Co.*, 93 U. S. 385; *Anderson v. Gill*, 79 Md. 312, 47 Am. St. Rep. 402, 29 Atl. 527.

There are numerous cases, besides those already adverted to, some of which are referred to hereafter, where the action was upon the check itself or upon the original indebtedness, and the defense was interposed of payment, by reason of laches in the presentation of the check for payment, which resulted in a loss or damage to the drawer, and such laches and consequent damage we have held may be shown under a plea of payment: *Watt v. Gans*, 114 Ala. 264, 62 Am. St. Rep. 99, 21 South. 1011.

Manifestly, the drawer's case is not made any stronger by the mere fact that he is plaintiff than it would, under the same circumstances, be if he were defendant and pleading that he was discharged by the payee or holder's delay in presenting the check. It would indeed be an anomaly to decide that the defendant had a reasonable time within which to present the check for payment in order to charge the drawer, and, under the same state of facts, to hold that the defendant was guilty of negligence in not presenting it before the expiration of such reasonable time.

Under the facts stated in the count of the complaint under consideration, the only obligation, so far as concerned the plain-

tiff, which rested upon the defendant, was to use due diligence to make presentment and demand of payment of the check, within the reasonable time allowed by the rules of the commercial law, and upon its being dishonored to give due notice to the drawer: 1 Morse on Banks and Banking, sec. 218.

What, then, is the reasonable time which the defendant had within which to discharge the obligation, under the facts of this case?

We consider it thoroughly settled that the reasonable time allowed the holder for presenting a check when he receives it in the same place where the bank on which it is drawn is located is till the close of banking hours on the next secular day, and if in the meantime the bank fails, the loss will fall on the drawer: Daniel on Negotiable Instruments, sec. 1590; Morse on Banks and Banking, secs. 240, 421; Randolph on Commercial Paper, sec. 1103; Merchants' Bank v. ⁵⁹² Spicer, 6 Wend. 443; Wear v. Lee, 87 Mo. 358; Bickford v. First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Simpson v. Pacific etc. Co., 44 Cal. 139; Loux v. Fox, 171 Pa. St. 68, 33 Atl. 190; Anderson v. Gill, 79 Md. 312, 47 Am. St. Rep. 402, 29 Atl. 527; Holmes v. Roe, 62 Mich. 199, 4 Am. St. Rep. 844, 28 N. W. 864; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690; O'Brien v. Smith, 1 Black, 99. We recognized and approved this rule in Industrial Sav. etc. Co. v. Weakley, 103 Ala. 458, 49 Am. St. Rep. 45, 15 South. 854.

In First Nat. Bank v. Nelson, 105 Ala. 180, 16 South. 707, this court held that checks were included in the word "bills" as used in section 1761 of the code of this state, relating to instruments governed by the commercial law. In that case, Judge Haralson, speaking for the court, says: "We fail to see why checks, as well as other commercial instruments, do not require the protection of the statute. They are as well known, and, from the necessities of the case, enter as largely into the commercial transactions of the country as other species of commercial instruments; and after all we have said and attempted on the subject of negotiable instruments for these many years, to relegate them to take their chances as commercial bastards and make their own way in the commercial world, deprived of the protection which is accorded to other negotiable instruments, it seems would be against reason, authority, and the interest of the country."

Nothing is shown by the count we have discussed which calls for any modification of the well-settled rule above announced.

The acceptance of the check by the defendant was only a payment of the draft, sub modo, and would become operative as a payment in fact only when the check was paid (Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690, 52 N. Y. 546), and the drawee bank being closed on March 31st, the defendant could on that day have tendered back to the drawer his check and made formal demand for the payment of the accepted draft: First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618.

Whether, therefore, his payment on March 31st, be treated as a payment of his check or of the acceptance, the result is the same as to him, as he was by reason of having accepted the draft liable thereon as the principal debtor: 3 Am. & Eng. Ency. of Law, 2d ed., 470; Tichnor v. Branch Bank, 3 Ala. 135. His liability was not ⁵⁹³ discharged, and under the views we have expressed the defendant was not liable to him in damages.

It follows that the demurrer to the first count should have been sustained; and that the former opinion in this case (Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 South. 11) must be overruled.

After the case returned to the circuit court, the plaintiff was allowed to amend his complaint by filing an additional count, which averred substantially the same facts that appear in the original complaint, except that he averred that, at the time he delivered his check to defendant, the latter "contracted with plaintiff to present the same within a reasonable time to said John McNab Bank for payment," and "that defendant violated its contract with plaintiff in that it did not present said check for payment to the John McNab Bank within a reasonable time on said March 30, 1891."

Without stopping to determine whether the meaning of the covenants is that a contract was made whereby the defendant agreed to present the check on March 30th, the day of its receipt, we are satisfied the court's ruling is free from error on this branch of the case. As we construe the original complaint, it counted on the want of due diligence or negligence of the defendant in presenting the check, and was therefore in case. The new count claiming damages by reason of the alleged violation of the contract therein set out was in assumpsit. But it is not allowable to join a count in case with one in assumpsit. By the introduction of the additional count, the complaint was made to contain a misjoinder of counts, and the de-

fect was properly taken advantage of by the demurrer to the entire complaint as amended: *Wilkinson v. Moseley*, 30 Ala. 562.

The plaintiff having declined to plead further, judgment was rendered against him, and the judgment of the circuit court is affirmed.

The foregoing opinion was prepared by former Chief Justice Brickell, and is adopted by the court.

BANK AS COLLECTING AGENT—PRESENTMENT.—A bank that receives commercial paper for collection is held to due diligence in making presentment. If it receives a check in payment of a claim held for collection, its duty is to present the check for payment on the same day it is received: See the monographic note to *Minneapolis etc. Co. v. Metropolitan Bank*, 77 Am. St. Rep. 616-618.

A BANK CHECK SHOULD BE PRESENTED for payment within a reasonable time. Otherwise the delay is at the peril of the payee: *Industrial Trust etc. Co. v. Weakley*, 103 Ala. 458, 49 Am. St. Rep. 45, 15 South 854; *Watt v. Gans*, 114 Ala. 264, 62 Am. St. Rep. 99, 21 South. 1011. But a delay, though sufficient to release an indorser, will not relieve the drawer from liability, unless he is injured thereby: *Parker v. Reddick*, 65 Miss. 242, 7 Am. St. Rep. 646, 8 South. 575.

HOBBS v. NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

[122 Ala. 602, 26 South. 189.]

EMINENT DOMAIN—LAND NOT INCLUDED IN PETITION FOR CONDEMNATION—VOID ORDER.—In condemnation proceedings, commissioners appointed to assess damages are not authorized to include in their report lands not embraced or described in the petition, and an order of court purporting to condemn them is void.

ESTOPPEL AGAINST INFANTS—SALE OF LAND.—IN EQUITY an infant will not be permitted to receive and retain that which forms the consideration for an invalid sale of his land, and at the same time be permitted to retake the property to the prejudice of those who have in good faith acted upon the transaction as valid.

ESTOPPEL AGAINST INFANTS—SALE OF LAND.—THE MERE RECEIPT OF THE CONSIDERATION upon an invalid sale of land will not of itself estop an infant from asserting his right of election whether to affirm the sale or to make restitution and reclaim the property.

ESTOPPEL AGAINST INFANTS—CONDEMNATION OF LAND—RECEIPT OF MONEY BY GUARDIAN.—A guardian has no authority to make or ratify an unauthorized disposition of the

infant's lands. Hence in condemnation proceedings to acquire the lands of an infant, the receipt of the condemnation money by the guardian does not estop the infant from subsequently reclaiming his land.

INFANTS—RATIFICATION OF SALE OF LAND—CONDEMNATION PROCEEDINGS.—If an infant upon becoming of age and without unfairness voluntarily receives and retains the money paid for his land in condemnation proceedings, with a full knowledge of the facts, the other party being in possession and no question of the statute of frauds arising, such action constitutes an election to treat the transaction as valid.

INFANTS—UNAUTHORIZED SALE OF LAND—RIGHT TO RETAKE LAND—RETURN OF MONEY.—An infant who has recovered judgment in ejectment against one who has acquired his lands in invalid condemnation proceedings will, in equity, be required to return the money received as a condition to his right to enforce his judgment.

Suit in equity by the railroad company. The company had acquired the lands of certain infants under condemnation proceedings which were invalid, because of a failure to describe such lands in the petition. The condemnation money was paid to the guardian, who later paid it to the infants. The infants recovered a judgment in ejectment against the railroad. This suit was to enjoin the enforcement of that judgment. Defendants demurred to the bill and moved to dismiss it. Demurrer overruled and motion denied. Defendants appeal.

Grayson & Foster, for the appellants.

Oscar R. Hundley, for the respondent.

600 SHARPE, J. The lands here involved not having been embraced or described in the petition filed in the condemnation proceedings, the commissioners appointed to assess damages therein were not authorized to include them in their report of such assessment, and the order of the probate court purporting to condemn them to the complainant's use was coram non judice and void: *Nashville etc. Ry. Co. v. Hobbs*, 120 Ala. 600, 24 South. 933. Therefore, unless estopped by some act or conduct on the part of these defendants, or of someone authorized to bind them, there is no legal or equitable reason to unconditionally forestall their right to the possession of the property.

Ordinarily, estoppels in pais are not created against infants, but cases may arise in which for the prevention of fraud or unfairness a court of equity may decree such an estoppel. Upon that principle it is well settled that no person, whether under legal disability or not, will in equity be permitted to receive and

retain that which forms the consideration for an invalid sale or disposition of his property, and at the same time to retake the property to the prejudice of those who have in good faith acted upon the transaction as valid: *Robertson v. Bradford*, 73 Ala. 116; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Bland v. Bowie*, 53 Ala. 152; *Bell v. Craig*, 52 Ala. 215; *Pickens v. Yarbrough*, 30 Ala. 408.

It does not follow, however, that the mere receipt of the consideration in such case will of itself bind the infant to part with his property. Nothing else appearing to preclude him in the assertion of his claim, the right of election whether to affirm the alienation, or to make restitution and reclaim the property, remains with the infant until his disability is ended and for a reasonable time thereafter, unless sooner compelled to elect by those having opposite rights who may resort to ^{equity} equity for that purpose. When its interference is sought in such case the court may elect for the infant with a view to his interest, but it will so decree as not to allow him the unfair advantage of avoiding the transaction while retaining its fruits: *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

The case is to be distinguished from those occurring where the infant has received nothing of substantial value for the property, as in the case of *Gillespie v. Nabors*, 59 Ala. 441, 31 Am. Rep. 20, in which the infants were allowed unconditionally to avoid the attempted sale.

The fact that the condemnation money was received by the guardian of defendants does not strengthen the reasons for decreeing an estoppel. A guardian, by virtue of his legal relation to an infant ward, has no authority to make or ratify for him an unauthorized disposition of the infant's lands: *Gillespie v. Nabors*, 59 Ala. 441, 31 Am. Rep. 20.

It is charged in the bill that the defendant Mary Willie Hobbs was of full age when she received her share of the money paid by complainant. If, being of full age and without unfairness, she voluntarily received and retained the money with a full knowledge of the facts relating to the payment and to the condemnation proceedings, the complainant being in possession and no question of the statute of frauds arising, such action might upon proper allegations and proof be held a conclusive election on her part to treat the transaction as a sale of her interest to the extent that the probate decree purports to condemn the same.

The bill is wanting in allegations of facts which would in themselves be sufficient to establish a conclusive estoppel against either defendant. It has equity, however, as a bill to require an election and a return of the money as a condition to their right to execute their judgment in ejectment. There is no specific prayer for that particular relief, but the sufficiency of the bill in that aspect is not brought in question either by the demurrer or the motion to dismiss.

The decree appealed from will, therefore, be affirmed at appellants' cost.

INFANT—DISAFFIRMANCE OF DEED.—A minor is not required, as a condition of disaffirming his conveyance of land, to restore the consideration, which was wasted by him during his minority: *Bullock v. Sprowls*, 93 Tex. 188, 77 Am. St. Rep. 849, 54 S. W. 661. It is otherwise, however, in equity, if he retains the consideration: *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906. See a further discussion of this subject in *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040; monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 687-694.

INFANCY.—AS TO WHETHER A GUARDIAN may disaffirm or ratify the contract of his infant ward, see the extended note to *Craig v. Van Bebber*, 18 Am. St. Rep. 698, 703.

PALLIS v. STATE.

[123 Ala. 12, 26 South. 339.]

ASSAULT WITH INTENT TO KILL—ABANDONMENT OF CHILD.—If a parent having charge of an infant of tender years abandons and exposes it to the inclemency of the weather, thereby intending to accomplish the death of the child, such parent is guilty of an assault with intent to kill.

HOMICIDE FROM EXPOSURE OR NEGLIGENCE.—If the exposure or neglect of an infant or other dependent person, resulting in death, is an act of mere carelessness, wherein danger to life does not clearly appear, the homicide is only manslaughter, but if such exposure or neglect is of a dangerous kind, it is murder.

Conviction for an assault upon a child with intent to kill. The defendant placed her new-born babe on the side of a public road in a sand bed, without clothing or wrapping, and left it there covered only by straw and leaves. The child was found the next day in an almost dying condition, but was revived and restored to health by a physician.

J. F. Jones, for the appellant.

C. G. Brown, attorney general, for the state.

14 HARALSON, J. It seems to be well settled that where a parent, having charge of an infant of tender years, abandons and exposes it to the inclemency of the weather, such parent is guilty of an assault. If physical detriment ensue from such exposure, it is a battery on the child: Russell on Crimes, sec. 1022, p. 1021; 2 Bishop's New Criminal Law, secs. 29, 33 (2), 72 (3), 660 (1).

"If the exposure or neglect of an infant or other dependent person, resulting in death, is an act of mere carelessness wherein danger to life does not clearly appear, the homicide is only manslaughter; whereas, if the exposure or neglect is of a dangerous kind, it is murder. For example, if from an infant of tender years the person under obligation to provide for it willfully withholds needful food or any other needful thing, though not with intent to kill, and by reason thereof the child dies, he commits murder": 2 Bishop's New Criminal Law, sec. 686.

The charge of the court was in consonance with the foregoing principles, and in its postulates was well within the evidence in the cause.

Affirmed.

THE NEGLECT OF A PARENT TO PROVIDE FOR HIS INFANT CHILD of tender years is an indictable misdemeanor: Note to Gay v. State, 70 Am. St. Rep. 74.

UNDER AN INDICTMENT FOR ASSAULT with intent to kill, the specific intent must be proved: Chrisman v. State, 54 Ark. 283, 28 Am. St. Rep. 44, 15 S. W. 889.

EX PARTE ROBERSON.

[123 Ala. 103, 26 South. 645.]

JUDGMENTS OF CONVICTION—SUFFICIENCY OF—HABEAS CORPUS.—A judgment of a court having jurisdiction of the person and of the offense "that the defendant be, and he hereby is, sentenced to be confined in the state penitentiary for a term of twenty-five months as a punishment for said offense," is a sufficient judgment of conviction, though it omits to expressly adjudge the defendant's guilt. He is not entitled to his liberty upon habeas corpus upon the ground that the judgment is void.

J. J. Curtis and F. E. St. John, for the petitioner.

C. G. Brown, attorney general, for the state.

104 SHARPE, J. The transcript made part of this petition shows that the petitioner was convicted in the circuit court of Cullman county upon an indictment for grand larceny, and that upon the verdict judgment was rendered "that the defendant be and he hereby is sentenced to be confined in the state penitentiary for a term of twenty-five months as a punishment for said offense."

Though it does omit to expressly adjudge the defendant's guilt, the judgment sentencing the defendant to the penitentiary sufficiently implies the judgment of guilt and is a judgment of conviction which would even support an appeal. The question has been expressly decided in *Wilkinson v. State*, 106 Ala. 28, 17 South. 458, and again in *Driggers v. State*, 123 Ala. 46, 26 South. 663.

To warrant his discharge upon habeas corpus the proceedings under which the petitioner is held must be illegal: *Ex parte Simmons*, 62 Ala. 416; *Ex parte Brown*, 63 Ala. 187. The defendant being legally held in custody under proceedings in a court having jurisdiction of his person and of the offense with which he was charged and has been convicted, the circuit judge properly refused to issue the writ, and here also it will be denied.

Habeas corpus denied.

IRREGULAR JUDGMENT.—HABEAS CORPUS is not an appropriate proceeding to review mere errors and irregularities in the judgment of an inferior court in a criminal case: *In re Fanton*, 55 Neb. 703, 70 Am. St. Rep. 418, 76 N. W. 447.

TENNESSEE COAL, IRON AND RAILROAD COMPANY v. LINN.

[123 Ala. 112, 26 South. 245.]

ADVERSE POSSESSION—TITLE BY—DEVESTMENT OF. If a person has acquired title to land by adverse possession, no abandonment by him of such possession, nor any other act short of a conveyance by him, can divest him of such title. It cannot be divested by any subsequent legislative enactment, and the law existing prior thereto and at the time of the ripening of the adverse possession into a perfect title is the law which must govern the case.

ADVERSE POSSESSION OF SCHOOL LANDS for ten years prior to the enactment of a statute exempting all school land from the operation of a ten year statute of limitation is sufficient to create a perfect title, as against the holder of a patent to such lands from township officers.

ADVERSE POSSESSION UNDER PAROL CONTRACT OF SALE—EXTENT OF.—The adverse possession of one entering and holding under an oral contract of sale after he has paid the purchase money is limited to the lands in his actual possession, and does not extend beyond that to the boundaries of the lands fixed by his contract, as it would if he held under written color of title.

EVIDENCE—PROOF OF FACT BY NOTORIETY.—The existence of a fact cannot be proved by reputation or notoriety, but if the fact is otherwise established, general notoriety in the neighborhood may be proved as competent evidence to charge a resident in that vicinity with knowledge of it.

W. Percy and W. I. Grubbs, for the appellant.

J. P. Tillman and Benners & Benners, for the appellee.

127 TYSON, J. It appears without dispute that in the spring of 1865 the plaintiff, who was a farmer by occupation, acquired the possession of one hundred acres of the land in controversy from his brother by an exchange for other lands. This exchange was not evidenced by any writing, but the plaintiff went into the actual possession of the land and made some improvement by clearing and cultivation and continued to clear, fence, and cultivate the tillable portion, increasing the acreage of tillable land to sixteen acres. The remaining portion of the land was uncleared, grown up in trees and other growth, wild, mountainous, and unfit for cultivation, from which he got, as he needed it during each of these years, his firewood, rails, timber for his own use, and cut therefrom frequently timber which he disposed of to others. There were three houses upon the tract which were occupied by tenants of plaintiff from 1865 to 1868, when they were destroyed. The continued use of the land under his contract of exchange, in the manner indicated above, in connection with the lands adjoining owned by him upon which he lived, was exercised by him uninterruptedly until the year 1876, when the testimony offered by the defendant tended to show, which however was disputed, that he ceased to cultivate the fields, and the fences around the cultivable lands were allowed to fall down in places, and shrubbery was permitted to grow upon them, until the year 1889, when he rebuilt the fences and a new house and inclosed a yard around it, to be used by his son as his tenant. It was also proved without dispute that plaintiff's brother claimed title to the land sued for under a purchase by him from the township trustees, some time prior to its exchange to the plaintiff, and that he was in possession of it at the time the exchange was made claiming under his purchase.

It was also without dispute that plaintiff's brother never claimed these lands after the exchange, and that it was generally known in the neighborhood that plaintiff claimed to own the lands, and that his possession was never interrupted by anyone until the defendant brought its action in ejectment against him in 1894, and obtained a judgment for all the land except that in cultivation and inclosed.

¹²⁸ We have stated the undisputed facts as shown by the bill of exceptions. For if the plaintiff acquired an indefeasible title by adverse possession to the lands during the years intervening between 1865 and 1876, no abandonment by him of the possession or any other act short of a conveyance by him could divest him of it. Nor could the title be divested by any subsequent legislative enactment; and the law existing prior thereto and at the time of the ripening of the adverse possession into a perfect title is the law of this case: *Doe ex dem. Alabama State Land Co. v. Beck*, 108 Ala. 71, 19 South. 802.

The first question then presented is, this being school land and the defendant claiming under a patent from the state of Alabama dated in 1890, and a deed from the plaintiff's brother with whom he made the exchange, whether ten years' adverse possession or twenty years' adverse possession was required to ripen this possession into a perfect title.

Under the codes of 1852 and 1867 we find the limitation of actions for the recovery of real estate to be as follows: 1. Actions at the suit of the state of Alabama against a citizen thereof for the recovery of real estate must be commenced within twenty years after the accrual of the cause of action; 2. Actions for the recovery of lands, tenements, or hereditaments, or the possession thereof, must be commenced within ten years after the cause of action has accrued.

Prior to the code of 1852 there was no statute as to time limiting the right of the state to enforce a cause of action brought for the recovery of lands belonging to it. This was the condition that existed as to the statute of limitation when the rights of Miller, the defendant in the case of *Miller v. State*, 38 Ala. 600, accrued. And when sued in an action of ejectment by the state for the use of the township trustees for sixteenth section lands, he invoked the defense of adverse possession for ten years, which was denied to him by the circuit court. On appeal, Justice Walker, speaking for the court, said: "Though the state is a party to this suit, it has ¹²⁹ no real interest in the litigation. If there had been a right

of recovery, the property sued for belongs, not to the state, but to the township; so that in fact the suit is substantially between the township and the defendant. The code expressly provides that in all cases where suits are brought in the name of the person having the legal right, for the use of another, the beneficiary must be considered as the sole party on the record. In our opinion, the rule that the statute of limitation does not run against the state has no application to a case like the present, when the state, though a nominal party on the record, has no real interest in the litigation, but its name is used as a means of enforcing the rights of a third person who alone will enjoy the benefits of recovery." He then proceeded at length to show that the defendant was an adverse holder, and should be protected by the statute of limitations of ten years.

The statute of limitations in respect to lands continued as codified in the codes of 1852 and 1867, and the construction in the case of *Miller v. State*, 38 Ala. 600, above quoted, until the thirtieth day of November, 1876, when the legislature, for the evident purpose of relieving trustees of all sixteenth section lands from the operation of the ten year statute as applied in that case, amended the statute exempting them from its operation: Acts 1876-77, p. 102. After the passage of this act the case of *State v. Conner*, 69 Ala. 212, was before this court. This was an action of ejectment brought by the state for the use of a township to recover of Conner school lands, and was tried in the circuit court on issue joined upon the plea of not guilty, which resulted in a verdict and judgment for defendant. The evidence introduced in behalf of defendant tended to establish an adverse possession by him for ten years prior to November 30, 1876, and before the commencement of the suit. And for the purpose of further establishing his adverse possession he was allowed to introduce certain conveyances as color of title under which he acquired possession and claimed title to the lands, against the objections of the plaintiff to which an exception was reserved. In addition to this exception the plaintiff requested a charge in writing to the effect that the statute of limitations of ten years ¹³⁰ was no defense to the action, which was refused by the court, to which an exception was also reserved by the plaintiff. Again this court, following the decision in the *Miller* case, through Judge Stone, held the statute of limitations of ten years was a good defense, and affirmed the rulings of the circuit court. The principles an-

nounced in these cases were recognized in the case of *Burks v. Mitchell*, 78 Ala. 61, and the latter case above referred to was cited with approval.

It is insisted by appellant that the cases of *Gaston v. State*, 88 Ala. 459, 7 South. 340, *Wyatt v. Tisdale*, 97 Ala. 594, 12 South. 233, and *Prestwood v. Watson*, 111 Ala. 604, 20 South. 600, are in conflict with the doctrine laid down in the *Miller* and *Conner* cases, and, being later adjudications of this court, should be followed. Before entering upon a discussion of these cases, which we will do in the order named above, it will be well to note another change in the statute of limitations. The act of November, 1876, was carried into the code of 1876, section 3225, and remained in force until the adoption of the code of 1886. Section 2613 of the code of 1886 provides: "Actions by or for the use of any township for the recovery of sixteenth section or other school lands belonging to the township" must be commenced after the cause of action has accrued within twenty years and not afterward. This was the first time the legislature made, by express declaration, the twenty years' statute applicable to causes of action arising out of adverse holding of school lands. This provision will be found in the code of 1896, section 2794. It was while this section of the code of 1886 was in force that these decisions were made. In the case of *Gaston v. State*, 88 Ala. 459, 7 South. 340, the suit was commenced in 1888, and the plea of adverse possession of fifteen years was held bad, for the obvious reason that the bar was not complete when the act of 1876 was passed. Under the averment of the plea the defendant had been in possession only three years when the ten year statute was repealed by that act.

In the case of *Wyatt v. Tisdale*, 97 Ala. 594, 12 South. 233, the evidence introduced by the defendant establishing his adverse possession and those through whom he claimed for more than twenty years was uncontroverted; and Justice Coleman¹³¹ correctly held that the affirmative charge should have been given for him. This would have been true under the facts in the case had adverse possession been for the ten years prior to 1876, and the only expression in his opinion which can be construed as conflicting with this view is to be found in the following language: "Our statute prescribing the time within which suits must be brought, which has been in force at least since the adoption of the code of 1852, is as follows: 'Section 2613. Limitations of twenty years.—Within twenty years: 1. Actions

at the suit of the state against a citizen thereof for the recovery of real or personal property; 2. Actions by or for the use of any township for the recovery of any sixteenth section or other school lands belonging to the township.' ”

The statement that subdivision 2 of section 2613 has been in force since the adoption of the code of 1852 was an error. As we have shown, it had no existence until the adoption of the code of 1886. In this respect the opinion must be modified. As persuasive that Judge Coleman recognized the rule as stated in the Miller case, he cites it in two places, and makes it the foundation of his opinion.

The case of *Prestwood v. Watson*, 111 Ala. 604, 20 South. 600, was correctly decided upon the facts. The agreement of facts upon which it was tried will be found in 79 Ala. 417. It appeared that Cooper's possession, through whom the defendant claimed, commenced in 1875, only one year prior to the act of 1876. There being, then, no statute of limitations in force as against township trustees of school lands from November 30, 1876, until the adoption of the code of 1886, and the suit being commenced in 1885, he could not have acquired the title within that period. Nothing short of twenty years' adverse possession would have given him a title by prescription. So the court in that case properly said: "There was no hostile possession for that period, prior to the commencement of this suit, claimed in the court below, and if it had been claimed, it would not have found support in the evidence."

We are clearly of the opinion that the rights of the defendant or those under whom it claimed had to be asserted ¹³² within ten years after their accrual under the facts of this case as against the adverse possession of the plaintiff. There are one hundred and sixty acres of land in the northwest quarter of section 16 claimed by plaintiff in this suit, which he claims he got from his brother, less fifteen acres in the "Flats of Five Mile creek." It appears, however, that as to forty-five acres, the plaintiff made declarations tending to show that he did not claim it under his exchange with his brother, and that in the former suit between these parties he disclaimed any right, title, and interest in this forty-five acres, and only claimed to own the one hundred acres. This forty-five acres, as was the greater portion of the one hundred acres, was woodland, mountainous, and unsuitable for cultivation, and only valuable and useful for the timber upon it. The testimony of defendant also tends to show that the plaintiff exercised no acts of ownership

over this forty-five acres by getting wood, rails, timber, etc., from it, as was done by him over the other portion of the tract claimed by him in the first suit.

When the plaintiff acquired possession from his brother and the brother accepted the plaintiff's lands and went into the possession of them in the spring of 1865, the contract between them became executed, and the plaintiff's possession became adverse to him, notwithstanding the exchange was made by parol agreement. There can be no difference on principle between this case and where a verbal sale of lands is made and the purchaser put into possession upon the payment by him of the purchase money. In the latter case the purchaser's possession after paying the purchase price is presumed to be in his own right and is adverse to his vendor. If this possession continues for the statutory period of ten years without recognition of or subordination to the legal title of the vendor, the right of entry or action to recover the possession is barred: *Potts v. Coleman*, 67 Ala. 221; *Tayloe v. Dugger*, 66 Ala. 451; *Beard v. Ryan*, 78 Ala. 37; *Newsome v. Snow*, 91 Ala. 641, 24 Am. St. Rep. 934, 8 South. 377.

In *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45, 12 South. 454, this principle is distinctly and clearly announced, and Justice ¹⁸³ Coleman, in the opinion, in speaking of the extent of the adverse possession by the purchaser, said: "We are clearly of the opinion that the purchaser who pays the purchase money for land and takes possession of it under a legal contract of sale, whether verbal or written, has possession coextensive with the lands included in his contract of purchase, and he may show the extent of his possession by the proof of the contract of sale and purchase, that in such case the contract will fix the boundary of his possession." Continuing, he says: "This principle applies as between vendor and vendee, or in case of execution sale, to the defendant in execution and the purchaser at such sale. It is not intended to modify or affect, in any way, the doctrine declared in the above authorities as to possession of mere trespassers or those who claim under color of title, but simply to declare that a valid contract of sale fixes the extent of the possession of one entering upon and holding the possession under such a contract, just as the possession of one who is under color of title is limited by the description in the writing which confers color of title."

A majority of the court are of the opinion that the doctrine announced extending the adverse possession under a valid parol contract of sale to the boundary of the lands as fixed by the contract is limited in its application as between vendor and vendee, or in case of execution sale, to the defendant in execution and the purchaser at such sale. That when no such relation exists between the parties litigant or their privies that the possession of the adverse holder is limited to his *possessio pedis*, unless he holds under written color of title. In other words, to extend adverse possession beyond the actual possession the adverse holder must enter upon and hold the lands under a paper writing fixing its boundaries—that color of title cannot exist or be evidenced in any other way except where the relation exists between the parties litigant above pointed out. Furthermore, they hold this is the settled rule of law in this state, whatever may be the doctrine in other states, and they must decline to depart from it. They rely upon *Hawkins v. Hudson*, 45 Ala. 482, *Bell v. Denson*, 56 Ala. 444, *Burks v. Mitchell*, 78 Ala. 61, and *Clements v. Hays*, 76 Ala. 280, as supporting their views.

¹³⁴ A careful examination of each of these cases in which it is held that it requires a written instrument to extend adverse possession to the boundaries of the tract claimed by the adverse holder will show that the question was not involved in the decision of the cause. In no one of them except in the case of *Bell v. Denson*, 56 Ala. 444, did the evidence disclose that the adverse holder was in possession claiming the lands under a valid parol contract in which the boundaries were fixed by such contract. And in *Bell v. Denson*, 56 Ala. 444, the court expressly declares that the doctrine was not involved, and rests an affirmance of the case upon distinctly different grounds. Besides, the force of the opinion as an authority for the rule under discussion is greatly impaired when considered in the light of its adjudication of the correctness of charge No. 5, given at the instance of the defendant, to which the appellant excepted, which was in the following words: "That if the said Denson bought the land in dispute from Petit, under a parol contract, and at the time of the purchase paid any of the purchase money and went into possession of the land, then said Denson has an adverse possession of said lands, and is entitled to protect himself in this suit under an adverse claim, upon actual or constructive notice of such claim." In passing upon this charge, among others, given at the request of the ap-

pellee, the court said: "It may be that one or more of the charges given at the request of the appellees had a tendency to mislead the jury. That, however, is not a reversible error; the appellants should have requested explanatory instructions. It cannot be affirmed that either of these charges is erroneous in the statement of legal principles."

Bearing in mind that the evidence disclosed no acts of possession by Denson upon the land, which consisted of a tract of three hundred and twenty acres of woodland, except the building of a house in which he resided, the inclosing, clearing, and cultivating five or six acres and working on a portion for gold for a period of more than ten years, the charge was clearly erroneous unless the doctrine which I contend for is the law. Clearly, if the rule obtains as announced by the other members of the court, the case should have been reversed.

¹³⁵ To my mind it is clear Justice Coleman did not intend to say that the doctrine so clearly announced by him in *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45, 12 South. 454, was to be limited in its application as held by the majority of the court. On the contrary, he said expressly "that a valid contract of sale fixes the extent of the possession of one entering upon and holding the possession under such contract, just as the possession of one who is under color of title is limited by the description in the writings which confer color of title."

I must confess my inability to comprehend the meaning of what seems to be plain and unambiguous language, if I am in error as to what he intended to say and did say. That he was correct in so holding I entertain no sort of doubt. The basis of the doctrine of adverse possession rests upon a possession under bona fide claim or color of title, open, notorious, continuous, and hostile to the title of the true owner: Mr. Freeman's note in *De Frieze v. Quint*, 28 Am. St. Rep. 158.

Adverse possession rests in the intention of the possessor, and it is said "the intention guides the entry and fixes its character": *Potts v. Coleman*, 67 Ala. 221; *Herbert v. Hanrick*, 16 Ala. 595; *Alexander v. Wheeler*, 69 Ala. 332. One of its essential elements as universally recognized by the courts and text-writers is that the possessor must claim to own the lands independent of the title or claim of all other persons. If his possession is in recognition of another's title as superior to his, and it is not material who that other person may be, no length of time will ripen his holdings into a title by adverse posses-

sion, notwithstanding all the other essential elements of adverse possession may exist. The converse of this proposition is equally as sound. If he claims bona fide to own the lands and the other essential elements are shown, his possession, if for ten years, ripens into an indefeasible title, not only as against his vendor but against the world: 3 Brickell's Digest, 17, sec. 3 et seq.; 1 Brickell's Digest, 49, sec. 9 et seq.

If the possessor acquires possession by a trespass, his possession is necessarily confined to his *possessio pedis*, for the obvious reason there is no means afforded by which his intention can be ascertained as to the extent ¹³⁶ in area of his claim except the lands actually occupied by him. But if his entry is under a written instrument defining the boundaries, his possession extends to the boundaries named in the writing, for the reason that the writing furnishes the evidence of his intention to claim to this extent, and this, too, notwithstanding the writing is unrecorded, and the owner of the lands had no notice of its existence, and notwithstanding the writing is void as a conveyance of title: *Stovall v. Fowler*, 72 Ala. 77; *Ryan v. Kilpatrick*, 66 Ala. 332; *Baucum v. George*, 65 Ala. 259; *Brady v. Huff*, 75 Ala. 80; *Childress v. Calloway*, 76 Ala. 128; *Watson v. Mancill*, 76 Ala. 600; *Farmer v. Eslava*, 11 Ala. 1028; *Hall v. Root*, 19 Ala. 378; *Hughes v. Anderson*, 79 Ala. 209.

It is evident that the notice to the owner of the claim of the adverse holder is not dependent upon a knowledge of the existence of the written instrument or of its contents under which such adverse holder claims title to the lands. It is the knowledge, either actual or imputable, of the possession of his lands by another claiming to own them bona fide and openly, that affects his right of entry: *Brown v. Cockrell*, 33 Ala. 38; *Hughes v. Anderson*, 79 Ala. 209. This being true, the only office or function which a written, unrecorded, void, and otherwise unknown instrument, so far as the owner is concerned, can possibly fulfill is to afford evidence of the claim of the adverse holder and the extent of that claim. For if it were otherwise a trespasser could never acquire title by adverse possession. Just why a verbal contract fixing the boundaries of the purchaser's possession is not of equal dignity and entitled to the same weight, when clearly proven, as a void, unknown, unrecorded writing, to serve as a guide in determining his entry and fix its character, I am unable to see. The position taken by my brothers seems to me to be flagrantly illogical, and certainly not conducive to justice and equity. For it may be, and

doubtless is, oftentimes the case that the adverse holder knows his deed is void, paying a consideration for the lands in proportion to his chances of success to remain in possession for ten years, and yet he is protected to the full extent of the boundaries described in ¹⁸⁷ his void deed, while the innocent purchaser who may have paid full value under a verbal contract is restricted to his *possessio pedis*. The great weight of authority in this country sustains me in my views as will be seen from an examination of the following authorities: 1 Am. & Eng. Ency. of Law, 2d ed., 848; Tyler on Ejectment, 863; 2 Smith's Lead. Cas., 8th Am. ed., 711; Green v. Kellum, 2 Pa. St. 258; McCall v. Neely, 3 Watts, 72; Tate v. Southard, 14 Am. Dec. 581, note; La Frombois v. Jackson, 8 Cow. 589, 18 Am. Dec. 463; Van Cleave v. Milliken, 13 Ind. 108; Baker v. Hall, 6 Baxt. 48; Teabout v. Daniels, 38 Iowa, 161; Rannels v. Rannels, 52 Mo. 108; MaGee v. MaGee, 37 Miss. 138.

The plaintiff in this case was not a trespasser. He had paid the purchase price of the land, and it was of no consequence whether his brother had paid the purchase money to the township trustees for it. If he had not, this could not have affected the plaintiff's rights, if he claimed to own it, as he did, as against them: Beard v. Ryan, 78 Ala. 37; Tayloe v. Dugger, 66 Ala. 444.

A majority of the court hold in consonance with their views that charges Nos. 1 and 2 requested by the defendant should have been given. Under the views which I entertain, they were properly refused, for the reason that as to the one hundred acres of the land acquired by the plaintiff under his contract of exchange, he was entitled to have the court charge affirmatively that he was entitled to recover it. As to whether he was entitled to recover the forty-five acres was a matter of dispute to be determined by the jury, there being a dispute as to whether it was included in the contract with his brother. And this I conceive to be true, notwithstanding he may not have known the location of the boundary lines, but if he claimed to them and they were capable of being ascertained under his contract of exchange.

There is no difference of opinion between us as to any other point in the case.

What we have said disposes of all the charges refused to the appellant except charge No. 7. This charge bases the defendant's right to a verdict to a certain portion of the land in controversy upon the theory that his disclaimer to that portion

in the former suit estopped him ¹³⁸ to claim it in this suit. Whether this would have been true if there had been a judgment rendered against him upon his disclaimer, we do not decide. The record discloses that it was merely an unsworn plea filed by him or his attorney in the former suit and fails to disclose any action if any was taken upon it. It is too well settled to need a citation of authorities that unsworn pleadings are mere suggestions of counsel; and therefore not binding upon the party litigant in whose behalf they are filed; and was not properly admissible in evidence. This was an error of which the appellant cannot complain, nor of the ruling of the court in limiting its effect.

The only other matter not disposed of was the ruling of the court in permitting the plaintiff to prove that it was generally known in the neighborhood that the land belonged to him against the objection of the defendant. We understand the rule to be that the existence of a fact cannot be proved by reputation or notoriety, yet where the fact is otherwise established, general notoriety in the neighborhood may be proved as competent evidence to charge a resident in such vicinity with knowledge of it. There was no error in admitting this testimony under the facts of this case: *Woods v. Montevallo Coal etc. Co.*, 84 Ala. 564, 5 Am. St. Rep. 393, 3 South. 475; *Humes v. O'Bryan*, 74 Ala. 81; *Price v. Mazange*, 31 Ala. 701.

For the error, as held by the other members of the court, committed in refusing charges Nos. 1 and 2, the judgment must be reversed and the cause remanded.

ADVERSE POSSESSION EXTENDS to the boundary of his deed, where the occupant enters upon land under a paper title. Otherwise it is confined to the *possessio pedis*, or corporeal occupation: *Royall v. Lisle*, 15 Ga. 545, 60 Am. Dec. 712; *Riley v. Jameson*, 8 N. H. 23, 14 Am. Dec. 325; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184.

THE BAR OF THE STATUTE OF LIMITATIONS IS A VESTED RIGHT: *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 483; and cannot be taken away by a subsequent statute: *Lawrence v. Louisville*, 96 Ky. 595, 49 Am. St. Rep. 309, 29 S. W. 450. This doctrine is applicable to title acquired by adverse possession: *Note to Cannon v. Stockmon*, 95 Am. Dec. 209.

LOUISVILLE BANKING COMPANY v. GRAY.

[123 Ala. 251, 26 South. 205.]

NEGOTIABLE INSTRUMENTS.—The negotiability of a note made payable to a bank is not affected by a stipulation therein authorizing “said bank to appropriate on this note, whether due or not, at any time, at its option, without notice or legal proceedings, any money which they, or any one or more of them, have jointly or severally in said bank on deposit or otherwise.” This stipulation does not render the date of payment nor the amount to be paid uncertain.

Satterfield & Young, for the appellant.

Mallory, McLeod & Mallory, for the appellee.

²⁵⁴ **TYSON, J.** The single question presented for decision is whether the clause “and authorizes said bank to appropriate on this note, whether due or not, at any time, at its option, without notice or legal proceedings, any money which they or any one or more of them have jointly or severally in said bank on deposit or otherwise,” destroys the negotiability of the note. The note sued upon was a promise in writing to pay five hundred dollars to the Commercial Bank of Selma on the twelfth day of December, 1896, “due December 15, 1896, at the Commercial Bank of Selma, Alabama,” and indorsed by the bank to the plaintiff.

The essentials of every promissory note are: 1. It must be in writing and signed by the maker; 2. It must contain a certain promise to pay; 3. The fact of payment must be certain; 4. The amount to be paid must be certain; 5. The medium of payment must be money, and money only; 6. It must be delivered; and to make it a commercial paper, under our statute, it must be payable at a bank or private banking-house, or a certain place of payment therein designated: Code, sec. 869; 1 Daniel on Negotiable Instruments, secs. 27-63.

The only difference between the ordinary promissory note and the commercial promissory note is the one made by the statute. The latter must have a designated place of payment named in it. There can be no question ²⁵⁵ that the note under consideration as to a designated place of payment contains this statutory requisite. The contention is that the clause quoted above renders the date of payment uncertain or the amount uncertain to be paid at the maturity of the note. If either of these contentions should prevail, it not only destroys the negotia-

bility of the note as commercial paper, but would destroy its character as a promissory note, leaving it nothing more than a simple contract to pay money, and, of course, subject to all defenses by the maker.

The only one of these contentions that is at all plausible is the one that the clause renders the note uncertain as to the date of payment.

The makers at all events obligated themselves to pay five hundred dollars. That was the amount named in the paper they were to pay, whether the payment was made at maturity or whether the bank exercised its option to appropriate any funds in its possession to its payment pro tanto or in full. The clause provided for no reduction in the sum to be paid, in the event of the appropriation by the bank before the day fixed for its maturity. Had the appropriation been made by the bank the next day after the delivery of the note and the funds so appropriated been five hundred dollars, the amount of the note, the makers could not have demanded a diminution on account of interest or otherwise, nor would the bank have been liable to them or either of them for a misappropriation of funds.

But it is said the bank had the right to apply any sum less than the full amount of the note, and had it exercised this right before its maturity, would render uncertain the amount due by the makers at the maturity of the note. We must confess our inability to comprehend how a sum certain deducted from a sum certain could produce an uncertain sum. It is needless to say that it is a matter of simple arithmetical subtraction.

It is said, further, had such an appropriation been made by the bank before its maturity so as to entitle the maker to a credit upon the note of a partial payment, the bank was not bound to evidence such payment ²⁵⁶ by indorsement upon the note, and therefore the bank could have negotiated the note to the plaintiffs in due course of trade for value without notice of such partial payment, before maturity. Though this would have been a palpable fraud, had the bank done so, and we may confess that it had the power to commit it, yet how does this fact affect the validity or negotiability of the note? The power was reposed by the makers, and unless the clause itself renders the sum agreed by them in the note to be paid uncertain, certainly no misconduct or fraud of the payee, after the delivery of the note unless expressed in writing upon it so as to carry notice to a purchaser of such misconduct or fraud could affect his

title if he paid value for it before its maturity. The purchaser would have the right to presume, unless the sum appropriated by the bank—and it is not contended in this case that the bank made any appropriation whatever—was indorsed somewhere upon the note, that none had been made by the bank, and that the full amount of the note was owing by the makers. And this is bound to be true upon the plainest principles that “fraud is never presumed.” But had the plaintiff, which it was not bound to do, made the inquiry of the bank at the time of its purchase of the note, if it had appropriated either of the makers’ money to the debt evidenced by the note in suit, the only truthful information that could have been imparted, under the facts of this case, would have been it had not done so. We will not pursue the inquiry into this phase of the case further, but will now discuss the other suggestion: Did the clause in the note render the note uncertain as to its date of payment?

It will be observed that there was no obligation imposed upon the makers to pay before December 15, 1896, the date fixed for the maturity of the note. No action could have been maintained upon it by the payee or the holder against them until after the latter date above named. Nor had they the right to mature the note earlier than that date, nor to make partial payments upon it; nor could they have compelled the holder to accept the full payment of it before maturity. It would have required the consent of the holder for them ²⁵⁷ to do any one or all of these things. The clause imposed no obligation upon the bank to apply money deposited by both or either of the makers to the satisfaction of the note pro tanto or in full while it was its property. It was a mere option which it could have exercised or not at its pleasure. Had the makers, or either of them, placed upon deposit in the bank, or otherwise in its custody or possession, the next day after the execution of the note, and permitted it to remain until its maturity, treble the sum of money which they had stipulated in the note to pay—yea, a hundred times this sum—the bank was under no legal duty to apply any portion of it. A similar provision in a note and involving the principle here announced was passed upon by the supreme court of New York in the case of *Hodges v. Shuler*, 22 N. Y. 114. This provision was, following an unconditional promise by a railroad company to pay one thousand dollars with interest thereon, payable semi-annually, as per interest warrants hereto attached as the same shall become due, in four years after date, “or upon the surrender of this

note, together with the interest warrants not due to the treasurer, at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period." The court said: "The instrument on which the action was brought has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an agreement in the alternative, to pay in money or railroad stock. It was not optional with the makers to pay in money or stock and thus fulfill their promise in either of two specified ways; in such a case, the promise would have been in the alternative. The possibility seems to have been contemplated that the owner of the note might, before its maturity, surrender it in exchange for stock, thus canceling it and its money promise; but that promise was nevertheless absolute and unconditional ~~and~~ and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon the surrender of the note that he was to recover stock; and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day specified; and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character or make the promise in the alternative, in the sense in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of one thousand dollars in four years from date, and its promise could only be fulfilled by the payment of the money at the day named."

The courts have gone very far in sustaining the character and negotiability of promissory notes; and very properly so, when it appears from the instrument that it was the intention of the parties to execute a note and not a mere contract for the payment of money. For apt illustrations to what length they have gone in this direction, see 1 Daniel on Negotiable Instruments, secs. 41, 43-45, and notes; 1 Randolph on Commercial Paper, secs. 110, 111, and notes; Justice McClellan's

opinion in *Commercial Bank of Selma v. Crenshaw*, 103 Ala. 497, 15 South. 741, and authorities there cited. Our opinion is that the instrument sued upon was a commercial promissory note.

The court committed an error in not sustaining the demurrer to the tenth plea of the defendants. The judgment is reversed and the cause remanded.

THE DOCTRINE OF THE PRINCIPAL CASE is affirmed in *Louisville Banking Co. v. Howard*, 123 Ala. 880, post, p. 126, 26 South. 207.

MUSGROVE v. GRAY.

[123 Ala. 876, 26 South. 643.]

WRITS OF ASSISTANCE—RECEIVERS.—The receiver of a dissolved corporation is not entitled to a summary writ of assistance to recover possession of property belonging to the corporation from persons who are not parties to the pending suit involving the appointment of the receiver, and who in good faith deny his right to the possession of the property, they claiming it under contract with the corporation.

PLEADING—VERIFICATION.—If the real issue in a case is one of law, the petition must be regarded as a mere pleading, as is the answer also, and the fact that the petition is sworn to, while the answer is not, is immaterial.

A. T. London and J. London, for the appellants.

J. J. Garrett, for the appellees.

878 McCLELLAN, C. J. This is a petition filed by receivers praying a writ of assistance to recover possession of certain real and personal property alleged to belong to the corporation of which petitioners are receivers against Musgrove Brothers, who are not parties to the case, but are in possession of the property. The petitioners base their right to relief upon the theory that when, as in this case, a corporation is voluntarily dissolved under the statute, contracts under which third parties hold its property are annulled and avoided, and that therefore the contract of this corporation under which Musgrove Brothers hold this property, and under which they allege they have the right to continue to hold it for a term yet to run, ceased to confer any such right upon them the instant the corporation was dissolved. This cannot be the law in respect to all contracts. For instance, if Musgrove Brothers held this property

under a lease for a term extending into the future the dissolution would not affect their rights under it. Nor would such a state of facts present any obstacle to the winding up of the affairs of the corporation within the statutory period, as is suggested by counsel, for the property could, of course, be sold or even divided among stockholders subject ³⁷⁹ to the leasehold interest. And for aught that appears to the contrary, Musgrove Brothers may have such a lease, or other contract entitling them to the possession notwithstanding the dissolution. So it is that the fact of dissolution is of no importance here, and the title to the relief prayed must be determined without regard to it, and upon the general principles which obtain in ordinary cases where the receiver seeks to recover possession of property in the hands of one not a party to the suit. Those principles do not, in our opinion, authorize this summary remedy by petition and writ of assistance under the circumstances disclosed here. The party in possession who asserts, in good faith and claim of right is entitled, under the guaranty of due process of law, to his day in court and a trial according to the customary forms of law. We attach no importance to the fact that the petition is sworn to and the answer is not. The real issue being one of law, the petition is to be regarded as mere pleading, as is also the answer. And we do not find that the answer justifies a conclusion that the respondents do not in good faith assert a right to the continued possession of the property. To the contrary, the case presents an effort of the receivers to recover possession of property from persons who are not parties to the cause, and who in good faith deny the receivers' right to the possession by a summary writ. The writ should not have been awarded. The receivers should be put to their action: *Beach on Receivers*, sec. 216; *Parker v. Browning*, 8 Paige, 388, 35 Am. Dec. 717; 20 Am. & Eng. Ency. of Law, 134.

The order awarding the writ of assistance is reversed and annulled, and an order will be here entered denying the writ and dismissing the petition.

A RECEIVER HAS NO RIGHT TO TAKE PROPERTY from the possession of a stranger to the action, who claims title paramount to that of the parties, and an order directing him so to do does not justify him therein: *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121. He must proceed by suit to try his right to the property, or the complainant must make such claimant a party to the suit and have the receivership extended to the property: *Parker v. Browning*, 8 Paige, 388, 35 Am. Dec. 717.

LOUISVILLE BANKING COMPANY v. HOWARD.

[123 Ala. 380, 26 South. 207.]

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER.—A negotiable note transferred to secure a pre-existing debt, in consideration of an extension of the time for the payment of the debt, constitutes the transferee a bona fide holder for value, and the note in his hands is not subject to equities between the original parties of which he had no notice.

NEGOTIABLE INSTRUMENTS.—The negotiability of a note made payable to a bank is not affected by a stipulation therein authorizing it to appropriate on this note, whether due or not, at any time, at its option, without notice or legal proceedings, any money which they, or any one or more of them, have jointly or severally in said bank on deposit or otherwise.

Action on a note executed by defendants and made payable to the Commercial Bank of Selma at that bank and indorsed to the plaintiff bank before maturity, in the ordinary course of business. Judgment for the defendants and the plaintiff appealed.

Satterfield & Young, for the appellant.

G. A. Robbins and H. S. D. Mallory, for the appellees.

383 **TYSON, J.** The cases of *First Nat. Bank of Decatur v. Johnston*, 97 Ala. 655, 11 South. 690, *Spira v. Hornthall*, 77 Ala. 145, *Connerly v. Planters' etc. Ins. Co.*, 66 Ala. 432, are conclusive that negotiable paper transferred to secure a pre-existing debt, in consideration of the extension of the time of the payment of the debt, makes the transferee a bona fide holder for value, and not subject to equities between the prior parties of which he had no notice.

The ninth plea should have negatived the presumption of the acquisition by the plaintiff of the note for a valuable consideration, it being shown by its averments that the plaintiff acquired it before maturity in the ordinary course of business: 3 *Brickell's Digest*, 91, sec. 130.

The insufficiency of the tenth plea is shown in the opinion in the case of *Louisville Banking Co. v. Gray*, 123 Ala. 251, ante, p. 120, 26 South. 205.

Reversed and remanded.

BONA FIDE HOLDER.—ONE TAKING COLLATERAL security for a pre-existing indebtedness must be regarded as a holder for value: *Russ Lumber etc. Co. v. Muscuplabe Land etc. Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 905. But see *Loewen v. Forsee*,

137 Mo. 29, 59 Am. St. Rep. 489, 38 S. W. 712; Yellowstone Nat. Bank v. Gagnon, 19 Mont. 402, 61 Am. St. Rep. 520, 48 Pac. 762.

THE NEGOTIABILITY OF A NOTE IS NOT AFFECTED, when made payable to a bank, by a stipulation authorizing it to appropriate on the note moneys of the maker in the bank: Louisville Banking Co. v. Gray, 123 Ala. 251, ante, p. 120, 26 South. 205.

MORRISSETT v. WOOD.

[123 Ala. 384, 26 South. 307.]

PHYSICIANS—ACTION FOR SERVICES OF—EVIDENCE. In an action by a physician to recover for medical services rendered to a person since deceased, the statement by such physician as a witness that he knew such deceased, that he had a certain disease and that he died from the effects of that disease, complicated with another, involves no transaction with the deceased, and is not within any exception to the competency of parties to a suit as witnesses.

PHYSICIANS—ACTION FOR SERVICES—VALUE OF PATIENT'S ESTATE.—In an action by a physician to recover for services rendered to a person since deceased, evidence as to the value of the decedent's estate is not admissible, unless a recognized usage in the community is shown to graduate professional charges with reference to the financial condition of the person receiving such services, which has been so long established and universally acted upon as to have ripened into a custom of such character that it may be considered that such services were rendered and accepted in contemplation of it.

PHYSICIANS—ACTION FOR SERVICES—VALUE OF PATIENT'S ESTATE.—In an action by a physician to recover for professional services rendered to a person since deceased, a hypothetical question expounded to an expert witness to prove the value of such services is objectionable, if one of its postulates is the value of such deceased patient's estate.

EVIDENCE OF EXPERTS—FORM OF QUESTIONS.—It is not necessary to questions propounded to expert witnesses that they shall postulate every fact of which there is evidence before the jury. Such questions are unobjectionable if they hypothesize a state of facts which the jury is authorized to find.

EVIDENCE—DISCRETION OF COURT IN ADMITTING.—If evidence is competent at the time it is introduced, and when the evidence is closed by both parties before the court adjourns until the next day, it is within the discretion of the court to decline to reopen the case upon its reconvention for the purpose of allowing the introduction of other evidence, the effect of which would, or might be, to show the impertinency of the evidence already admitted.

TRIAL—INSTRUCTIONS, if abstract, are properly refused.

E. P. Morrissett and C. Wilkinson for the appellant.

Lomax, Crum & Weil and A. A. Wiley, for the appellee.

³⁹⁰ McCLELLAN, C. J. The statement of the plaintiff as a witness that he knew the defendant's testator, and ³⁹¹ that he had a certain disease for several years before his death, and that he died of that disease complicated with another which witness named, involved no transaction with the deceased, and is not within the first—or any other—exception to the competency of parties as witnesses under section 1794 of the code.

The trial court erred in admitting testimony as to the value of the patient's estate, against the objection of the defendant. The inquiry was as to the value of the professional services rendered by the plaintiff to the defendant's testator, and, as the case was presented below, the amount of value of the latter's estate could shed no legitimate light upon this issue nor aid in its elucidation. The cure or amelioration of disease is as important to a poor man as it is to a rich one, and, *prima facie* at least, the services rendered the one are of the same value as the same services rendered to the other. If there was a recognized usage obtaining in the premises here involved to graduate professional charges with reference to the financial condition of the person for whom such services are rendered, which had been so long established and so universally acted upon as to have ripened into a custom of such character that it might be considered that these services were rendered and accepted in contemplation of it, there is no hint of it in the evidence.

The hypothetical question propounded to the expert witnesses, Gaston and others, was objectionable only because one of its postulates was the value of the testator's estate. It is not necessary for such questions to postulate every fact of which there is evidence before the jury, but they are unobjectionable if they hypothesize a state of facts which the jury is authorized to find.

The evidence of the witness Carr as to services rendered by the plaintiff to Barksdale, the defendant's testator, prior to November, 1895, was competent as it stood in the case at the time when the evidence was closed by both parties whereon the court adjourned till the next day. It was, we think, in the discretion of the court to decline to reopen the case on its reconvention for the purpose of allowing the defendant to offer other evidence the effect of which would or might have been to show the impertinency of this testimony of Carr.

³⁹² No account of the plaintiff was offered in evidence by him, or was at all in evidence. The charge requested by the

defendant was therefore abstract in a sense. Moreover, this charge is sufficiently argumentative in character to justify the court's action in refusing to give it.

For the error pointed out, the judgment must be reversed. The cause is remanded.

HYPOTHETICAL QUESTIONS MAY BE BASED upon any assumption of facts which the testimony tends to prove, according to the theory of the examining counsel: *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 307, 58 Pac. 962. There is no error in permitting the witness to answer, though some immaterial fact is omitted from the interrogatory: *Kliegel v. Aitken*, 94 Wis. 432, 59 Am. St. Rep. 901, 60 N. W. 67.

EVIDENCE—WEALTH.—The admissibility in evidence of the pecuniary circumstances of parties is considered in *Eltringham v. Earhart*, 67 Miss. 488, 19 Am. St. Rep. 319; notes to *Rowe v. Moses*, 67 Am. Dec. 562-568; *Brown v. Barnes*, 33 Am. Rep. 377-380.

ABSTRACT INSTRUCTIONS are improper: *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625, 30 Pac. 430; *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21, 15 South. 511.

SOUTHERN RAILWAY COMPANY v. WARD.

[123 Ala. 400, 26 South. 234.]

GARNISHMENT — PERSONAL JUDGMENT WITHOUT PERSONAL SERVICE.—Service of a writ of garnishment issued in aid of a pending suit does not confer jurisdiction of the defendant therein, without personal service upon or appearance by him, so as to authorize personal judgment against him.

GARNISHMENT — PERSONAL JUDGMENT WITHOUT PERSONAL SERVICE.—A judgment against a garnishee based upon a personal judgment rendered against a nonresident defendant without personal service upon or appearance by the latter, is void, and is no protection to such garnishee against a subsequent garnishment for the same fund.

Smith & Weatherly, for the appellant.

L. C. Bradley, for the appellee.

403 HARALSON, J. It appears from the statement of facts that there were six proceedings in the city court, viz.: A suit by summons and complaint by B. M. Allen against W. P. Bewley, and a garnishment suit in aid thereof against the appellant company, prior in point of time to the others that followed; second, a suit by summons and complaint by the appellee, W. P. Ward, against said defendant, and a garnishment in aid thereof, against the same company, which proceedings were subsequent to the said original suit of said B. M. Allen,

but prior in point of time to the others that followed; and third, an ancillary attachment sued out by said B. M. Allen against said defendant Bewley, on the ground ⁴⁰⁴ that he was a non-resident, which was executed by summoning the said appellant company as garnishee.

From this statement it is clear that if the garnishment issued out of the justice's court in aid of the original suit in that court of Allen against defendant Bewley had been made effectual by proper judgment against the garnishee, it would have been superior to the garnishment by the appellee Ward; but it is admitted that in the Allen case service of process was never had on the defendant, and he never appeared therein. The defendant being a nonresident, and never having been served or never having appeared, the plaintiff had no authority to take a personal judgment against him, and if not, no judgment of condemnation of the fund in the garnishee's hands could have been rendered: *Brake v. Curd Sinton Mfg. Co.*, 102 Ala. 339, 14 South. 773; *Byars v. Baker*, 104 Ala. 173, 16 South. 72; *Exchange Nat. Bank v. Clement*, 109 Ala. 270, 19 South. 814. In the case last cited, departing from the rule theretofore prevailing in this state, it was held that an attachment against a non-resident when executed by the levy on property or by garnishment against defendant's debtor, was a proceeding in the nature of a proceeding in rem, rather than that of a proceeding in personam; that the judgment rendered must correspond to the nature of the proceeding; that of necessity it must ascertain and declare the amount of the debt, claim or demand sought to be enforced by attachment, and that this must be ascertained and declared in the same mode and form as if the suit was in personam, etc.

The proceedings before the justice are not fully set out, but results of such proceedings are merely stated in the answer of the garnishee. If, however, the judgment rendered against the defendant by the justice in favor of Allen was a judgment in personam, then according to our more recent adjudications it was void, and could not become the foundation of the judgment afterward rendered against the garnishee; and in such case the judgment of the appellee Ward against defendant on personal service, and the one thereafter rendered in his favor against the garnishee, would be superior to the Allen garnishment. But the contention of appellant—to ⁴⁰⁵ state it in the language of its counsel—is that: "The original garnishment was not void ab initio; but, on the contrary, created an inchoate

lien on the fund in the garnishee's hands, subject to be forfeited on the obtaining of a valid judgment against the non-resident defendant, Bewley. This judgment was obtained as the result of securing legal service of process on him by attachment." The vice of this contention is, that it assumes that the levy of the attachment by service of the writ of garnishment was the equivalent and answered the purpose of personal service on defendant or appearance by him. But such an execution of the attachment did not, according to our later decisions, take the place of personal service on or appearance by defendant, and could not support a personal judgment against defendant. Nor did the plaintiff Allen rely on the garnishment in the original suit; for, recognizing the fact that it was unavailing to take the place of service, he sued out his ancillary attachment. If he had regarded the execution of the writ of garnishment as the equivalent of personal service, as formerly it was held to be, he would have proceeded to judgment in his case, without resort afterward to the writ of attachment and its execution by garnishment process on appellant, as a foundation to condemn the fund attached. This was all that was open to him. Whatever rights, therefore, he gained against the defendant and to the fund in the hands of the garnishee, arose out of the attachment and its execution by garnishment writ on appellant, and not out of his original suit by summons and complaint, and garnishment in aid thereof. His two proceedings were distinct, in which separate results were proposed, and might be attained: *Francis-Chenoweth etc. Co. v. Bailey*, 104 Ala. 566, 18 South. 10. Allen, therefore, acquired no lien on, and had no right to, the condemnation of the fund except under his attachment, and this was subsequent to the garnishment and the lien of the appellee thereunder, made effectual by his judgment against defendant on personal service, and the condemnation of the fund in appellant's hands to pay the same.

Affirmed.

JURISDICTION BY ATTACHMENT is discussed in the note to *Miller v. White*, 76 Am. St. Rep. 800-805. A personal judgment cannot be rendered against a nonresident who has not been served with process within the state: *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634, 54 Am. St. Rep. 573, 61 N. W. 243; *White v. Johnson*, 27 Or. 282, 50 Am. St. Rep. 726, 40 Pac. 511.

GARNISHMENT WITHOUT PERSONAL SERVICE.—The garnishment and condemnation of a debt due a nonresident, without personal service within the state of suit on the defendant or owner of the debt, or his voluntary appearance, is without due process of law: *Louisville etc. R. R. Co. v. Nash*, 118 Ala. 477, 72 Am. St. Rep. 181, 23 South. 825.

WARE v. KENT.

[123 Ala. 427, 26 South. 208.]

JUDGMENTS—AMENDMENT NUNC PRO TUNC—COLLATERAL ATTACK.—The power resides in every court to correct and amend the entries on its minutes, nunc pro tunc, and no court can incidentally or collaterally question the verity of the record as amended. The remedy against an improper amendment is by appeal, or some other method of direct attack.

JUDGMENTS—AMENDMENT NUNC PRO TUNC.—The record evidence of the rendition of a judgment at a prior term, and of the failure of the clerk to make a proper entry thereof on the minutes of the court, supplies every fact necessary to the entry of a perfect judgment, and authorizes the entry thereof nunc pro tunc.

JUDGMENTS—AMENDMENT.—NOTICE TO THE OPPOSITE party is not necessary in order to enable the court to amend its judgment nunc pro tunc.

JUDGMENTS—AMENDED RECORD AS EVIDENCE.—If the effect of the amendment of a judgment nunc pro tunc is to substitute a perfect judgment entry for an imperfect entry made on the minutes of the court when the judgment was rendered, such amendment imparts regularity to the execution issued on the judgment imperfectly entered, and to all proceedings under it.

Denson & Tanner, for the appellants.

J. M. Gillespy, for the appellee.

⁴²⁹ McCLELLAN, C. J. Joshua Ware had title to the land in suit by patents from the United States. The plaintiffs are his heirs at law. The defendant claims title through an execution issued on a judgment against said Joshua, the levy thereof upon this land, its sale thereunder, and the purchase at such sale by defendant's grantor to whom the sheriff executed a deed. The judgment upon which this execution issued was rendered by a competent court, but not entered by the clerk of the court, or imperfectly entered. Subsequent to the sale under execution the sale and conveyance by the purchaser thereat to this defendant and to the institution of ⁴³⁰ this suit, the plaintiffs in that cause, one of whom was such purchaser and grantor, moved the court to enter said judgment nunc pro tunc, or rather to amend its imperfect entry nunc pro tunc. This motion in due course was granted, and a judgment in all respects regular and formal was entered of record as of the original rendition of judgment in the cause.

On the trial of this cause a transcript from the record of the court in which said judgment had been rendered, showing the pleadings in the cause, the bench notes of the judge render-

ing judgment by default and assessing the damages, and directing judgment for the amount thereof, the imperfect entry made by the clerk of the judgment rendered as shown by the bench notes, the motion to amend the entry nunc pro tunc, the order of the court granting the motion and entering or directing the entry of formal judgment, and the formal judgment so entered, was offered in evidence, and admitted against the objection of the plaintiffs. And this action of the court is really the only matter presented for review by this appeal, since all the other rulings excepted to, including the finding and conclusion of the judge sitting without a jury, and the judgment rendered thereon were proper or not as the admission in evidence of this transcript was proper or not.

That the transcript, or at least so much of it as showed the entry of a formal and regular judgment having effect as of the original rendition of judgment, was properly received in evidence, there can, we think, be no serious doubt. The objections to it were wholly untenable upon two distinct grounds: In the first place, the correctness of the court's action in entering the judgment nunc pro tunc could not be inquired into or impeached collaterally by objection to the introduction of its record in this other cause. The power resides in every court to correct and amend the entries on its minutes nunc pro tunc, and no court can incidentally question the verity of the record as amended. The court receiving the amended record must take it as it is certified by the proper officer, and is not at liberty to look beyond it to inquire how it came to be as it is. The remedy against an improper amendment is by appeal, or some other ⁴³¹ method of direct attack, and in no case by collateral and incidental assault: *Jones v. Lewis*, 8 Ired. 70, 47 Am. Dec. 338; *State v. King*, 5 Ired. 204; *Galloway v. McKeithen*, 5 Ired. 12, 42 Am. Dec. 153; *Hamilton v. Seitz*, 25 Pa. St. 226, 64 Am. Dec. 694; 1 *Freeman on Judgments*, secs. 67, 74.

But if the rule were otherwise, and admitted of the collateral attack of nunc pro tunc judgments in respect of the proof upon which they are based, the result would be the same in this case. The amendment here made was upon record or quasi record evidence of the rendition of a judgment at the prior time, and of the failure of the clerk to make proper entry thereof on the minutes, and this record evidence supplied every fact necessary to the entry of a perfect judgment: 1 *Freeman*

on Judgments, sec. 61 et seq.; 3 Brickell's Digest, 577, 578; Nabers v. Meredith, 67 Ala. 333, and cases there cited.

No notice of the motion to amend is necessary, as was expressly decided in Nabers v. Meredith, 67 Ala. 333.

The effect of the amendment was to substitute for the imperfect entry made when the judgment was rendered the perfect entry directed by the order granting the motion to amend as of the time of the rendition and imperfect entry; and the matter now stands, as between the parties to that suit and their privies, precisely as if a formal and perfect judgment had been duly entered in the first instance. The very purpose of such amendments generally is to support proceedings already taken under the original entry; and the effect here is to impart regularity and formality to the execution issued on the judgment imperfectly entered and to all proceedings under it: 1 Freeman on Judgments, secs. 67, 74.

The court properly received the transcript in evidence, and, as we said above, the propriety of all its other rulings necessarily follows.

Affirmed.

JUDGMENTS—NUNC PRO TUNC ENTRY.—The power is inherent in courts of law and equity to make entries of judgments nunc pro tunc in proper cases and in furtherance of the interests of justice: Knefel v. People, 187 Ill. 212, 79 Am. St. Rep. 217, 58 N. E. 388. Upon what evidence such entry may be made, see the monographic note to Ninde v. Clark, 4 Am. St. Rep. 831, 832; Knefel v. People, 187 Ill. 212, 79 Am. St. Rep. 217, 58 N. E. 388. As to whether notice to the parties is necessary, see the note to Ninde v. Clark, 4 Am. St. Rep. 833.

AN AMENDED RECORD STANDS AS IF NEVER DEFECTIVE, and no court can inquire incidentally into its verity: Jones v. Lewis, 8 Ired. 70, 47 Am. Dec. 838; Hamilton v. Seitz, 25 Pa. St. 226, 64 Am. Dec. 694.

KUHL v. GALLY UNIVERSAL PRESS COMPANY.

[123 Ala. 452, 26 South. 535.]

GAMBLING CONTRACTS—SALE OF SLOT MACHINES.—If the vendor of slot machines to be used as gambling devices goes beyond the act and purpose of making a sale, and in making it actively and purposely participates in the promotion of the illegal use, he becomes particeps criminis, and cannot recover upon the contract of sale, nor can the innocent holder for value of notes given for the purchase price of such machines under such contract of sale recover thereon.

GAMBLING CONTRACTS, though not immediately involving a wager, are void as against public policy.

GAMBLING CONTRACTS—RENEWAL NOTES.—If notes secured by mortgage, given for the purchase price of slot machines are void, because such sale constitutes an illegal gambling contract, and are subsequently surrendered, and new notes secured by mortgage are given in lieu of the originals, the new notes are also illegal and void, and subject to the same defenses as the original notes.

GAMBLING CONTRACTS—JURISDICTION OF EQUITY TO RELIEVE AGAINST.—If a statute extends the jurisdiction of equity "to all cases founded on a gambling contract so far as to sustain a bill of discovery and grant relief," and a bill is filed to foreclose a mortgage given to secure notes founded on a gambling contract, the maker thereof is entitled to maintain a cross-bill to have such notes and mortgage declared void and unenforceable.

L. B. Sheldon and G. L. and H. T. Smith, for the appellant.

Clarkes & Webb and Bestor & Gray, for the appellee.

⁴⁵⁵ **SHARPE, J.** The original bill seeks the foreclosure of a mortgage on real estate given to secure certain promissory notes made by defendant to one Charles Schimpf and by him indorsed to the Clawson Slot Machine Company and by that company transferred together with the mortgage to the complainant. The debt originated in the purchase by Schimpf of three hundred dice throwing slot machines, at thirty-five dollars each, from complainant's transferrer, together with the exclusive right, with certain exceptions, to use and dispose of the machines ⁴⁵⁶ in certain designated states. In the first contract, in which the machine company was represented by one Blanckensee, the machines were to be shipped to such points as Schimpf might designate, with a sight draft attached to the bill of lading to be paid on delivery. After a few weeks, a number having been shipped and only a part of them having been paid for and delivered, another agreement was made—the machine company then acting through its secretary, one Cross

—whereby the remainder of the machines were to be delivered upon the orders of Schimpf, who then made a partial payment of three thousand dollars and gave for the balance his several notes indorsed by the defendant, Mrs. Kuhl, who also, to further secure the notes, gave a mortgage upon her property described in the bill.

Subsequently, the machines having been delivered and three of those notes having been paid, others were past due and unpaid, and a new agreement was made according to which the unpaid notes and the mortgage were surrendered, and in their place were substituted notes made by the defendant to Schimpf and indorsed by him to the machine company, that company taking a new mortgage executed to it by the defendant upon the same property embraced in the old mortgage, and Schimpf then transferred the machines to the defendant. Of the last-mentioned notes three were paid and the remainder are the same here involved.

Defense is made under the statute which declares that "all contracts founded in whole or in part upon a gambling consideration are void" (Code, sec. 2163); and the cross-bill seeks relief against the enforcement of the notes and mortgage.

The dice throwing machines were plainly gambling devices. Their use and adaptation, as disclosed by the proof, was to determine by a chance throw of dice whether the person depositing his money in the slot should lose the money or win cigars. In *Loiseau v. State*, 114 Ala. 34, 62 Am. St. Rep. 84, 22 South. 138, the operation of a similar machine was described, and it was said that those playing against them were guilty of gambling.

The sale of an article adapted to such use is not in itself illegal, and under the weight of authority it may ⁴⁵⁷ be assumed that the mere knowledge on the part of the vendor that the article will probably be used for gambling will not render the contract of sale invalid. If, however, the vendor goes beyond the act and purpose of making a sale, and by making it actively and purposely participates in the promotion of the illegal use, he becomes *particeps criminis*, and cannot recover upon the contract of sale: *Bickel v. Sheets*, 24 Ind. 1; *Rose v. Mitchell*, 6 Colo. 102, 45 Am. Rep. 520; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Skiff v. Johnson*, 57 N. H. 475.

The generally established rule independent of statute is that contracts made in furtherance of gambling transactions, though not immediately involving a wager, are void as against public

policy: Authorities *supra*; *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. Rep. 776; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160; *Helber v. Schantz*, 109 Mich. 669, 67 N. W. 913; *Johnson v. Clark*, 51 N. Y. Supp. 238; 23 Misc. Rep. 346; *Spurgeon v. McElwain*, 6 Ohio, 442, 27 Am. Dec. 266; *Graves v. Johnson*, 156 Mass. 211, 32 Am. St. Rep. 446, 30 N. E. 818.

That such is the nature of the contract involving the original sale of the slot machines the evidence is convincing. It appears that shortly before the trade in question Blanckensee had placed a machine in Schimpf's saloon in Mobile, had explained to him its use, and contracted to pay him for cigars which Schimpf was to supply to settle the machine's losses, and also to pay Schimpf ten per cent of the profits, which he represented to be about sixty per cent, sometimes amounting to forty dollars per day for a single machine. Several other machines had then been placed in operation in Mobile under similar contracts with others. Having thus interested Schimpf, Blanckensee sold him for cash eighteen machines, including the going machines in Mobile and the contracts he had for their use. He then sold Schimpf the three hundred machines and the territorial right, agreeing at the same time to assist Schimpf in placing a supply in Birmingham, which agreement he carried out by visiting Birmingham with Schimpf, and placing for him about thirty machines under contracts similar to those made in Mobile. Having thus inaugurated the game, the machine company guarded it from interference by posting a standing offer of reward for the apprehension of persons ⁴⁵⁸ tampering with or robbing a machine, which offer was maintained after Schimpf's purchase. On one occasion thereafter the company actually paid such a reward of twenty-five dollars, and explained its motives to Schimpf, saying: "Our object was to benefit you, thinking that in that way the police force would understand that we mean to be honorable in our transactions and they would not be prejudiced against us. We thought it would be a great help to you in placing machines in Mobile. Kindly inform us what effect it has had, if any."

Schimpf was inexperienced in the business, and the service of Blanckensee in starting the business doubtless formed a material inducement to the purchase. It was as much a part of the consideration as was the value of the machines. The machine company was bound by the contract of its agent, and its attitude as a promoter of the gambling business is reasonably established.

The first notes and mortgage given represented the balance due upon the same contract, so that the illegality of consideration was carried into them. When she gave the notes and mortgage here involved, the defendant's liability was only as indorser on the first notes and as the maker of the first mortgage. The surrender of those first papers and an extension of time of payment formed the only consideration moving from the machine company to her for the second papers. Long prior to their execution the company had parted with all its interest in the machines, and their transfer to defendant was a consideration moving to her only from Schimpf. Whatever taint of illegality existed in the first notes and mortgage infected the last notes and mortgage, and the same defense can be made to the last as to the first: *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. Rep. 776; *Hynds v. Hays*, 25 Ind. 31.

Illegality of consideration for negotiable paper arising merely from its being offensive to public policy does not affect the rights of an innocent holder for value; but the rule is otherwise when the instrument is made absolutely void by statute as in contracts founded in whole or in part on a gambling consideration: *Manning v. Manning*, 8 Ala. 138; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Finn v. Barclay*, 15 Ala. 626; *Hawley v. Bibb*, 69 Ala. 52.

⁴⁵⁹ But it is contended for the complainant that though the contract be *contra bonos mores* as in furtherance of gambling, it is not a gambling contract within the meaning of the annulling statute; and that, therefore, complainant should be protected as an innocent holder of the notes. The moral principle which the contract offends is precisely that which the statute is designed to protect. The terms of the statute do not require its restriction to actual wagers or to contracts made in settlement of betting losses. Such has not been its interpretation in this court.

The case of *Hawley v. Bibb*, 69 Ala. 52, involved a bill filed by a transferee of a bill of exchange to foreclose a mortgage given to secure the bill, the consideration of which was a loan of money furnished the borrower as a stake with which to engage in the buying and selling of cotton futures. Upon the ground that the contract was governed by the laws of New York it was held enforceable here; but it was said that "if the contract had contemplated that the money should have been advanced and loaned in this state upon transactions made here, the bill of exchange would fall within the interdiction of the

statute, and would be void even in the hands of an innocent holder for value."

In *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 South. 711, a similar transaction was under consideration by this court, and the case of *Hawley v. Bibb*, 69 Ala. 52, was referred to approvingly as showing that the statute was applicable to such a case.

The principle so declared in those cases is applicable to the transaction here involved, and the conclusion follows that the notes and mortgage in suit must be held void under the statute referred to.

Ordinarily, courts of equity will refuse assistance to all the parties to an illegal transaction. But section 638 of the code extends the jurisdiction of courts of equity "to all cases founded on a gambling consideration so far as to sustain a bill of discovery and grant relief." The policy of this statute is not to aid a loser, but to discourage gambling; and accordingly the courts are bound to exercise the jurisdiction and to relieve in proper cases without imposing upon the party seeking it the usual condition of doing equity: *Finn v. Barclay*, 15 Ala. 626; ⁴⁶⁰ *Cheatham v. Young*, 5 Ala. 353. Therefore, under the cross-bill the notes and mortgage must be declared void unconditionally; but the decree will also direct the delivery up of one hundred and twenty-five machines to the complainant according to the defendant's offer made in her cross-bill.

The decree appealed from will be reversed and a decree here dismissing the original bill, and granting relief under the cross-bill as has been indicated. The appellee will pay the costs in this court and in the chancery court.

NOTE — GAMBLING CONSIDERATION.— A negotiable note growing out of a gambling transaction is invalid between the parties, but valid in the hands of a bona fide holder, unless declared void by statute: *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687. See, further, *Swinney v. Edwards*, 8 Wyo. 54, 80 Am. St. Rep. 916, 55 Pac. 806; *Snoddy v. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127; *Haight v. Joyce*, 2 Cal. 64, 56 Am. Dec. 311; *Stanford v. Howard*, 103 Tenn. 24, 76 Am. St. Rep. 635, 52 S. W. 140.

A **SLOT MACHINE** is a lottery: *Lolseau v. State*, 114 Ala. 34, 62 Am. St. Rep. 84, 22 South. 138; *Meyer v. State*, 112 Ga. 20, 81 Am. St. Rep. 17, 37 S. E. 96. It is a gambling device, and keeping it a criminal offense: *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322.

HENDERSON v. FARLEY NATIONAL BANK.

[123 Ala. 547, 26 South. 226.]

FRAUDULENT CONVEYANCES.—JUDGMENT CREDITORS MAY, WITHOUT ISSUANCE OF EXECUTION, or the return of an execution nulla bona, maintain a bill to subject to the payment of their debts any property fraudulently transferred, or attempted to be fraudulently transferred, by their debtor.

FRAUDULENT CONVEYANCES.—JUDGMENT CREDITORS MAY PURSUE PROPERTY fraudulently transferred by their debtor, although he has other assets out of which they might enforce the collection of his debts, and of necessity the solvency or insolvency of the debtor is of no consequence.

FRAUDULENT CONVEYANCES—BILL TO SET ASIDE—MULTIFARIOUSNESS.—A bill in equity by a creditor, seeking to vacate several conveyances of the debtor's property as fraudulent, and to subject the property so conveyed to the satisfaction of his demand, is not multifarious because the several grantees, who are joined as parties defendant, acquired different portions of the property under separate and distinct conveyances executed at different times, and there is no allegation that these several sales and conveyances had any actual connection with one another in any way, either in fact or intent.

FRAUDULENT CONVEYANCES—BILL TO SET ASIDE—VERIFICATION—DISCOVERY.—A bill by a creditor seeking to set aside as fraudulent a conveyance of his property by the debtor, and to subject such property to the payment of his debt, and praying for a discovery as to any other property owned by such debtor, is not demurrable because not verified. The discovery asked is merely incidental to the relief sought.

FRAUDULENT CONVEYANCES—ACCOUNTING AGAINST PARTNERSHIP.—If a bill by a creditor to set aside fraudulent conveyances by his debtor and to subject to the payment of his debt the property owned by the debtor alleges that such debtor is a member of a partnership and that, for the purpose of hindering, delaying and defrauding his creditors, he has sold his interest in such partnership business to his copartner, who with guilty knowledge, and to aid such debtor in his intent has purchased such property, a special prayer in such bill for relief against the partnership for an accounting and settlement thereof, and that the interest of the debtor therein be ascertained and applied to the payment of the debt, does not render the bill subject to demurrer, since the creditor is entitled to such relief upon proof of the allegations in the bill.

Foster, Samford & Carroll, for the appellants.

Roquemore & Harmon, for the appellee.

553 TYSON, J. The bill in this cause was filed by a judgment creditor of respondent, J. M. Henderson, against him, Alex Henderson & Co., a firm composed of his son, Alex Henderson, and his son in law, W. C. Black, Fox Henderson, and

Maggie Henderson, and seeks to have declared fraudulent certain conveyances and transfers alleged to have been made by him of certain property to Henderson & Co. and certain property to Maggie Henderson, with the intent to defraud his creditors. As to Fox Henderson it is alleged in the fourth paragraph of the bill as follows: "Orator avers that for several years prior to the time of the filing of this bill said J. M. Henderson and Fox Henderson have been engaged in and doing business as partners under the firm name and style of J. M. Henderson & Co.; that their principal business was loaning money to different persons, for which they took notes and mortgages, and orator avers that there is now a large amount of money due said J. M. Henderson & Co. by different persons, but orator is not informed as to the interest of said J. M. Henderson and the said Fox Henderson in said business of J. M. Henderson & Co., but orator charges as a fact that they are equal partners and equally interested in said business, but orator avers on information and belief, and avers as a fact, that they are equal partners and equally interested in said business, but orator avers on information and belief, and as a fact, that pending the suit against said J. M. Henderson in favor of orator in the circuit court ⁵⁵⁴ of Pike county, Alabama, of which the said Fox Henderson well knew the said J. M. Henderson has been arranging to withdraw and withdrawing, and is now continuing to withdraw, as much as possible the moneys and assets from said business, and with the aid of said Fox Henderson has been and is converting his assets invested in said business in money or bond or property of such character as that he can place it, and he has largely placed it, beyond the reach of his creditors, so that it cannot be reached and subjected to the payment of orator's judgment by ordinary legal process; and orator avers that the said Fox Henderson has been and is aiding and assisting said J. M. Henderson in placing his property and assets beyond the reach of creditors and beyond the reach of orator, by purchasing the interest of the said J. M. Henderson in various debts and assets that they are mutually interested in, with knowledge of the fraudulent intent and purpose of the said J. M. Henderson, by paying him the money for same, or in other ways which are not fully known to orator."

The bill further alleges that J. M. Henderson had money, property and assets amounting to the value of fifty thousand dollars or other large sum, but that during the pendency of complainant's suit in which the judgment was obtained he

transferred this property and assets to the several respondents in such manner as to obstruct the collection of complainant's judgment by levy and sale under execution, or he has disposed of his said property to the several respondents, who had full knowledge of his financial condition and of the pending suit against him, and of his intent and purpose to place the same beyond the reach of his creditors, and received from them the money in payment of the same, "so that orator avers that the said J. M. Henderson has no property for the payment and satisfaction of orator's judgment against him which can be reached by ordinary legal process against him, and orator avers that a discovery of moneys, property, and assets of the said J. M. Henderson is necessary for the payment and satisfaction of orator's said judgment; and to the end that orator may have the information necessary to discover the property and ⁵⁵⁵ assets of the said J. M. Henderson in order to obtain payment and satisfaction of said judgment, the said J. M. Henderson and his several co-respondents are required to make full, true, and complete answers to the interrogatories propounded."

It has been too well settled by the decision of this court to be now questioned that a judgment creditor, without a return of nulla bona, or the issuance of execution, may maintain a bill to subject to the payment of his debt any property which has been fraudulently transferred or attempted to be fraudulently conveyed by his debtor: Code, sec. 818; *Carter v. Coleman*, 82 Ala. 177, 2 South. 354; *Wooten v. Steel*, 109 Ala. 563, 55 Am. St. Rep. 947, 19 South. 972; *McClarín v. Anderson*, 109 Ala. 571, 19 South. 982.

Nor can it now be a matter of disputation that the judgment creditor may pursue property fraudulently conveyed, although the debtor has other legal assets out of which the creditor may enforce the collection of his debt, and of necessity the solvency or insolvency of the debtor is of no consequence: *McClarín v. Anderson*, 109 Ala. 571, 19 South. 982; *Beall v. Lehman*, 110 Ala. 446, 18 South. 230, and authorities therein cited.

It is equally as well settled by the decisions of this court that a bill in equity by a creditor seeking to vacate and set aside several conveyances of the debtor's property as fraudulent, and to subject the property so conveyed to the satisfaction of his demand, is not multifarious because the several grantees, who are joined as parties defendant, acquired different portions of the property under separate and distinct conveyances executed at different times, and there is no allegation that these several

sales and conveyances had any actual connection with each other in any way, either in fact or intent: *Hill v. Moone*, 104 Ala. 353, 16 South. 67, and authorities therein cited.

The bill is not one for discovery only, but was properly filed, and in this respect its sufficiency is not questioned, to subject the property of complainant's debtor, which it is alleged was fraudulently conveyed to Alex ⁵⁵⁶ Henderson & Co. and Maggie Henderson. Upon the allegations as to those two grantees, if true, there cannot be serious doubt of the right of the complainant to relief, independent of the discovery sought by the bill. The discovery there sought is merely incidental to the relief; the complainant being entitled to have these conveyances declared fraudulent, and to subject the property held by these grantees to the payment of the judgment, the grounds of demurrer to the bill, predicated upon the theory that it should have been verified, were properly overruled: Code, sec. 679; *Burke v. Morris*, 121 Ala. 126, 25 South. 759, and authorities there cited; *Plaster v. Throne-Franklin Shoe Co.*, 123 Ala. 360, 26 South. 225.

What we have said disposes of all the grounds of the demurrer insisted upon in argument except the ninth, which relates only to the fourth paragraph of the bill and the relief prayed under it.

The special prayer for the relief against J. M. Henderson & Co. is that an accounting and settlement be had of the partnership business of the said J. M. Henderson & Co., and the interest of J. M. Henderson be ascertained, and it be condemned to the payment and satisfaction of the complainant's judgment.

This ground of demurrer is as follows: "There is no equity in that part of said bill of complaint wherein complainant seeks to have the partnership of J. M. Henderson & Co. brought into this court, and that the same be settled, upon the ground that complainant has not shown by its bill any right to have said partnership settled and have the interest of said J. M. Henderson therein subjected to its said judgment, it not having bought the interest of said Henderson in said partnership, and has not shown any other interest which it has in the interest of J. M. Henderson therein, which would authorize it to have a settlement thereof in this court for the benefit of complainant."

Appellant's counsel in drawing this demurrer and their argument here have wholly misconceived the effect of the averments of the fourth paragraph of the bill, and the special prayer. If the allegations be true that Fox Henderson is aiding

J. M. Henderson, his partner, to ⁵⁵⁷ convert his interest in the partnership assets into money, for the purpose of putting it beyond the reach of his creditors, by purchasing from him his interest in the property, with a knowledge of his purpose to hinder, delay, or defraud his creditors, this stamps the transactions as fraudulent, and the complainant has the right to have such sale and purchase set aside. And after securing the setting aside of the transfer between them, the title of J. M. Henderson to the property having never passed, as against his creditors, the complainant unquestionably has the right to have the court settle the partnership and condemn J. M. Henderson's interest to the satisfaction of its judgment. There was no error in overruling this ground of demurrer.

We find no error in the record and the decree must be affirmed.

FRAUDULENT CONVEYANCE—BILL TO SET ASIDE.—It is considered that when a creditor has reduced his claim to judgment, he has sufficiently exhausted his legal remedies to entitle him to a creditor's bill to set aside fraudulent conveyances that obstruct the satisfaction of his judgment. In such cases the issue of execution and return thereof are generally dispensed with: See the monographic note to *Ladd v. Judson*, 66 Am. St. Rep. 287. Compare *Spooner v. Travelers' Ins. Co.*, 76 Minn. 811, 77 Am. St. Rep. 651, 79 N. W. 805.

FRAUDULENT CONVEYANCE—OTHER PROPERTY.—Though a debtor conveys property with the intention of defrauding his creditor, the latter cannot complain if the former retains or subsequently acquires property out of which the debt may be collected: *Brumbaugh v. Richcreek*, 127 Ind. 240, 22 Am. St. Rep. 649, 26 N. E. 664. However, creditors are not required to go beyond the state in search of such property before proceeding against the property fraudulently transferred: *O'Brien v. Stambach*, 101 Iowa, 40, 63 Am. St. Rep. 368, 69 N. W. 1133.

ADAMS v. TEAGUE.

[123 Ala. 591, 26 South. 221.]

DEEDS—GRANTORS, WHO ARE.—If one or more persons are mentioned in the body of a conveyance as grantors, and their names are subscribed to it, the additional signature of another person who is nowhere mentioned in the instrument does not make it his deed.

DEEDS—WIFE'S LAND—HUSBAND'S ASSENT.—The assent and concurrence of a husband required by statute to give validity to a conveyance of his wife's lands can be manifested only by his joining in the alienation in such way as would be

necessary to the conveyance of his interest if the land belonged to him in severalty or jointly, or in common with others. If such deed is signed by him, but his name appears nowhere in the body of the instrument, it is void.

Ejectment. Plaintiff claimed title as purchaser at a foreclosure sale under a power contained in a mortgage of land constituting the homestead of A. J. Teague and N. G. Teague, his wife. The mortgage was signed by both, but the name of A. J. Teague did not appear anywhere in the body of the mortgage. Judgment for the defendants and plaintiff appealed.

J. G. Cowan, for the appellant.

Espy & Farmer, for the appellees.

⁵⁹³ HARALSON, J. 1. It has been several times held by this court that when one or more persons are mentioned in the body of the conveyance as grantors and their names are subscribed to it, the additional signature of another person who is nowhere mentioned in the instrument does not make it his deed: *Sheldon v. Carter*, 90 Ala. 380, 8 South. 63. We need not repeat the reasons for this holding. This principle is precisely applicable to the facts of this case.

2. We have more recently held that the assent and concurrence of the husband which is required by statute (Code, sec. 2528 [2348]) to give validity and effect to a deed conveying the wife's lands can be manifested only by his joining in the alienation in such a way as would be necessary to the conveyance of his interest if the land belonged to him in severalty or jointly, or in common with others; and that when a deed is signed by the husband, ⁵⁹⁴ under the facts as the one before us purports to have been signed, it is nothing more than the void deed of the wife, inoperative to divest her title in the land: *Davidson v. Cox*, 112 Ala. 510, 20 South. 500; *Johnson v. Goff*, 116 Ala. 648, 22 South. 995.

There was no error in giving the general charge for defendants.

Affirmed.

SIGNING A DEED BY ONE NOT NAMED THEREIN is inoperative to convey his interest in the premises: *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486. This rule applies to a conveyance by a married woman in which her husband alone is described as grantor: *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65, 26 S. W. 1068. However, there are authorities holding that it is not necessary that the husband should be named as grantor to enable his wife to convey her separate estate, but that it is sufficient if he signs, seals, and acknowledges the deed: *Note to Payne v. Parker*, 23 Am. Dec. 227, 228.

STERN v. BUTLER.

[123 Ala. 606, 26 South. 859.]

GARNISHMENT AGAINST FRAUDULENT ATTACHMENT.—A judgment creditor may by garnishment subject to the payment of his debt money in the hands of an officer as the proceeds of a sale of the debtor's property under an attachment sued out by another creditor in fraudulent collusion with the common debtor. In such garnishment proceeding evidence that such attachment proceedings were fraudulent is admissible.

ATTACHMENT—WHEN FRAUDULENT.—If a person, in collusion with an insolvent debtor, sues out a writ of attachment, obtains judgment in pursuance of their collusive agreement in which is condemned the effects of such debtor to the payment of the collusive debt, this is a fraud upon other creditors of such debtor, and such judgment cannot be enforced.

H. A. Pearce, for the appellants.

W. W. Sanders, for the appellees.

*** **TYSON, J.** The appellants, having obtained a judgment against Nicholson, Blount & Co., can resort to the remedy afforded by a writ of garnishment to subject money in the hands of a transferee or grantee of their judgment debtor acquired by such transferee or grantee in actual fraud of their rights as creditors: *Nicrosi v. Irvine*, 102 Ala. 652, 48 Am. St. Rep. 92, 15 South. 429; *Henry v. Murphy*, 54 Ala. 246; *Price v. Master-son*, 33 Ala. 483.

When the plaintiff in attachment, by collusion with the insolvent debtor, sues out his writ of attachment, obtains a judgment in pursuance of their collusive agreement in which is condemned the effects of the insolvent debtor, this is as effectual a fraud against the rights of the debtor's other creditors denounced by the statute as if the transfer of his property had been made by a conveyance upon a simulated consideration. It is actually fraudulent in securing to the plaintiff in attachment a preference which he is not entitled to, and which the courts will not recognize and enforce: *Comer v. Heidelberg*, 109 Ala. 220, 19 South. 719; *First Nat. Bank v. Acme White Lead etc. Co.*, 123 Ala. 344, 26 South. 354.

The money in the hands of the sheriff, which was collected under the judgment rendered in the attachment proceedings instituted by the claimants in this cause, appellees here, was subject to the writ of garnishment sued out by the appellants and served upon the sheriff, if the attachment proceedings un-

der which the appellees asserted their title to the money was fraudulent against the appellants. The judgment in the attachment cause was coram non judice as to these appellants, and the trial court erred in not allowing them to introduce evidence that the attachment and judgment thereon was fraudulent as against them, as creditors of the insolvent concern, Nicholson, Blount & Co.

The judgment is reversed and the cause remanded.

GARNISHMENT.—PROPERTY IN CUSTODIA LEGIS cannot ordinarily be attached or garnished: *Brewer v. Hutton*, 45 W. Va. 106, 72 Am. St. Rep. 804, 30 S. E. 81; *Allen v. Gerard*, 21 R. I. 467, 79 Am. St. Rep. 816, 44 Atl. 592.

GARNISHMENT, WHAT SUBJECT OF.—In *Nicrosi v. Irvine*, 102 Ala. 648, 48 Am. St. Rep. 92, 15 South. 429, it is said that where a debtor fraudulently assigns a chose, his creditor may subject it by garnishment to the payment of a judgment against him.

AMERICAN NATIONAL BANK v. HENDERSON.

[128 Ala. 612, 28 South. 498.]

BILLS OF LADING—TRANSFER OF, VESTS TITLE TO PROPERTY.—Indorsement and delivery of a bill of lading to one who discounts the draft to which it is attached transfers to him the title to the goods in transitu covered by such bill of lading as effectually as if the goods themselves had been delivered to him.

BILLS OF LADING—CONDITIONAL PLEDGE OF PROPERTY BY TRANSFER OF.—A bill of lading stands for and represents the goods therein receipted for during their transit and until they are completely delivered to the person entitled to them, and if the consignor draws upon the consignee for the purchase price of the goods shipped, and the draft with the bill of lading attached is indorsed and transferred to a third person, who discounts the draft, a special property in the goods thereby passes to such transferee, subject to be divested by the acceptance and payment of the draft. If the consignee refuses to accept and pay such draft, the title to the property in transitu under the bill of lading becomes absolute in him as against the consignor and his creditors.

Foster, Samford & Carroll, for the appellant.

R. L. Harmon, for the appellee.

*14 **TYSON, J.** The facts are without dispute that the defendant on the second day of March, seven days before the suing out of the attachment by the plaintiffs, transferred by indorsement and delivered the bill of lading covering the ship-

ment of the corn, the title to which is in controversy. This indorsement and delivery to the claimant of the bill of lading, upon its discount of the draft to which it was attached, was a transfer to it of the title to the corn in transitu as effectually as if the corn itself had been delivered: 4 Am. & Eng. Ency. of Law, 2d ed., 564, and note 1; Porter on Law of Bills of Lading, sec. 421; Allen v. Maury, 66 Ala. 10. The theory upon which the question of title to the corn was submitted to the jury seems to have been that the evidence was susceptible of a reasonable inference that the transaction between the defendant and claimant by which the bill of lading was transferred did not amount to a sale of the corn, but to a mere pledge of it. It may be conceded, although the facts disclosed by the record do not warrant it, that the transaction was a mere pledge of the corn to secure the draft and its indorsement, discounted by the claimant for the defendant; yet this would not affect their right to maintain the claim suit. "When the consignor draws upon the consignee for the purchase money, and the draft, the bill of lading attached, is indorsed or transferred to some one who discounts the bill of exchange, a special property in the goods thereby passes to the transferee, subject to be divested by the acceptance and payment of the draft. And if the consignee refuses to accept the draft, the title of such transferee becomes absolute. But the acceptance and payment by the consignee ⁶¹⁶ of the draft, accompanied with the bill of lading or shipment receipt, vest the title to the goods in him. A bill of lading stands for and represents the goods therein receipted for during their transit and until they are completely delivered to the person entitled to them, but no longer": 4 Am. & Eng. Ency. of Law, 548, note 1; Porter on Law of Bills of Lading, sec. 511 et seq. Such a pledge of a bill of lading received in good faith operated as a vesture of a title to the corn in the claimant as against the consignor and his creditors: 4 Am. & Eng. Ency. of Law, 631; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 13; Chandler v. Sprague, 38 Am. Dec. 404, and note on pages 419-421.

The affirmative charge, as requested by claimant, should have been given.

The judgment is reversed and cause remanded.

BILLS OF LADING ARE SYMBOLS OF PROPERTY: Union Pac. Ry. Co. v. Johnson, 45 Neb. 57, 50 Am. St. Rep. 540, 68 N. W. 144. Their assignment, while goods are in transit, operates to trans-

fer the title thereto: Ayres etc. Co. v. Dorsey Produce Co., 101 Iowa, 141, 63 Am. St. Rep. 876, 70 N. W. 111. See, further, the extended note to Chandler v. Sprague, 38 Am. Dec. 407-426, on bills of lading.

BOUTWELL v. VANDIVER.

[123 Ala. 634, 26 South. 222.]

EQUITY—MULTIFARIOUSNESS OF BILLS.—To render a bill in equity multifarious as to subject matters, there must be different grounds of suit alleged, and each ground must be sufficient to sustain a bill. The prayer must also be looked to in testing the character of the bill, but the prayer alone, not supported by averments, though it be for alternative or different or inconsistent kinds of relief, does not make the bill multifarious.

CREDITORS' BILLS—CANCELLATION OF MORTGAGE.—A creditor having a lien by execution may resort to equity for the removal of obstacles fraudulently employed to defeat an execution, and which would prevent a sale at value thereunder. A bill in equity may be maintained for the cancellation of a fraudulent mortgage, in aid of a specific execution lien upon the property covered by the mortgage, and which the complainant has the right to pursue.

EQUITY.—PRAYERS for relief in a bill in equity having no basis in averments of fact may be disregarded, but are not ground for demurrer to the whole bill.

EQUITY—DEMURRER TO BILL.—Facts alleged which are immaterial to the case made by a bill in equity may be subject to exception or motion to strike out, but are not subject to demurrer segregating them from other parts of the bill.

Lane & Crenshaw, for the appellant.

C. E. Hamilton, for the appellee.

637 **SHARPE, J.** By the allegations of this bill it appears that complainants were judgment creditors of the defendants, P. F. Boutwell, having within a year and after the return of fieri facias unsatisfied sued out a second execution, and had it levied upon a fourth interest in certain real estate belonging to his debtor Boutwell. That long previous thereto a note with mortgage security upon the same property had been executed by Boutwell to one Davis; that Boutwell has paid this note and mortgage, and "has had the same transferred to his wife (Mary Boutwell) for the purpose of hindering, delaying, and defrauding the complainants in collecting their said judgment by a sale of said property," and that Mary Boutwell has advertised the property for sale under the power expressed in

the mortgage. It prays that the sale may be enjoined and the mortgage canceled, and also that if anything is found due on the mortgage, that defendants be decreed to pay it; and that upon their failure to do so the property be sold and the proceeds applied first to the mortgage and second to the judgment.

The defendants demurred separately to the whole bill, and those demurrers respectively are divided into four parts; but each demurrer in each of its parts assigns the single ground of multifariousness.

To render a bill multifarious as to subject matters there must be different grounds of suit alleged and each ground must be sufficient to sustain a bill: 14 Ency. of Pl. & Pr. 197. The prayer must also be looked to in testing the character of the bill; but the prayer alone not supported by averments, though it be for alternative or different or inconsistent kinds of relief, does not make the bill multifarious: *Florence Gas etc. Co. v. Hanby*, 101 Ala. 15, 13 South. 343; *McCarthy v. McCarthy*, 74 Ala. 546; *Rives v. Walthall*, 38 Ala. 329; *Yarborough* ⁶³⁸ v. *Avant*, 66 Ala. 526; 14 Ency. of Pl. & Pr. 204.

The bill does not make a case for relief as from a transfer of property by P. F. Boutwell to hinder, delay, or defraud complainant as a creditor. For that purpose, unless the conveyance be purely voluntary, it is necessary to show participation in the wrongful intent on the part of the grantee: *Governor v. Campbell*, 17 Ala. 566; *Stover v. Herrington*, 7 Ala. 142, 41 Am. Dec. 86; *Anderson v. Hooks*, 9 Ala. 704. And the facts from which the fraud arose must be shown; a mere general allegation that the transfer is made to hinder, delay, and defraud creditors being insufficient: *Jones v. Massey*, 79 Ala. 370; *Flewellen v. Crane*, 58 Ala. 627.

Such facts are not here shown. For all that appears the transfer of the mortgage to Mrs. Boutwell may have been before its alleged payment, and she may have bought it for value and without any wrong intent, and even prior to the existence of complainant's debt. The allegation that she "is utterly insolvent and without means to have purchased said mortgage" does not show that at the time of the transfer she did not have or obtain money wherewith to make the purchase.

However, a fraudulent use of the mortgage is here alleged, in that it has been paid, notwithstanding which fact Mrs. Boutwell, as transferee, is proceeding to effect a sale of the property under the power expressed in the mortgage.

Under our statute payment of the mortgage debt divests the title passing by the mortgage and vests it in the mortgagor. Thereafter he cannot come into equity to redeem, but it has been held that because the payment rests in parol, leaving the title apparently outstanding by the mortgage, the mortgagor may in equity have it canceled as a cloud upon his title: *Kelly v. Martin*, 107 Ala. 479, 18 South. 132.

For a like reason the mortgage, though paid, is still a menace to complainant's lien acquired by the issue and levy of their execution; and especially in view of the threatened sale thereunder, it may seriously depreciate the price which might otherwise be obtained at execution sale.

It is established that a creditor having a lien by execution may resort to equity for the removal of obstacles fraudulently employed to defeat an execution and which would prevent a sale at value thereunder: *Planters' etc. Bank v. Walker*, 7 Ala. 926; *Dargan v. Waring*, 11 Ala. 988, 46 Am. Dec. 284; 3 *Pomeroy's Equity Jurisprudence*, sec. 1415.

Such is the jurisdiction invoked by this bill. The appropriate remedy is by a cancellation of the mortgage in aid of a specific lien rested by the levy upon the property covered by the mortgage, and which complainants have the right to pursue.

The bill is not filed in a double aspect, there being no facts averred, alternatively or otherwise, upon which to base relief other than the cancellation of the mortgage. Prayers for relief having no bases in averments of fact may be disregarded: *Rives v. Walthall*, 38 Ala. 329.

For the reasons stated neither the demurrers to the whole bill nor that directed to a part upon the assumption that a fraudulent transfer of property was attempted to be shown are well assigned.

The remaining demurrer is by Mary Boutwell alone, and is directed to the fifth and sixth sections of the bill. Section 6 is a mere statement of legal conclusions as to what relief should be granted, and section 5 contains no averment of fact except that Mrs. Boutwell is insolvent and without means to have purchased or paid the mortgage, and that the property is more than sufficient to discharge any unpaid balance on it. Those facts are immaterial to the case made by the bill, and may be subject to exception or motion to strike; but the demurrer segregating them from other parts of the pleading presents no

issue of law for the court to determine, and there was no error in overruling it.

The decree appealed from will be affirmed at appellant's cost.

FRAUDULENT ENCUMBRANCE.—A CREDITOR'S BILL may be maintained by judgment and execution creditors to remove fraudulent encumbrances placed by a debtor on his property: *Dunham v. Cox*, 10 N. J. Eq. 437, 64 Am. Dec. 460. See a further discussion of this question in the extended notes to *Massey v. Gorton*, 90 Am. Dec. 293-295; *Ladd v. Judson*, 66 Am. St. Rep. 286-288.

DUNSTON v. STATE.

[124 Ala. 89, 27 South. 333.]

CRIMINAL LAW—CARRYING CONCEALED WEAPONS.—One may be guilty of carrying a concealed weapon while alone in his own home.

Indictment for carrying a concealed pistol. The defendant was arrested in his cabin, and the officers, upon searching him, found upon his person a concealed pistol. He was convicted and appealed.

James B. Cox, for the appellant.

Charles G. Brown, attorney general, for the state.

SHARPE, J. Neither by the letter nor by the spirit of the statute prohibiting the carrying of weapons concealed about the person is any exception created in favor of place. One of the objects of the law is the avoidance⁹⁰ of bad influences which the wearing of a concealed deadly weapon may exert upon the wearer himself, and which in that way, as well as by the weapon's obscured convenience for use, may tend to the insecurity of other persons: *Owens v. State*, 31 Ala. 387; *Reid v. State*, 1 Ala. 612, 35 Am. Dec. 44.

The mental suggestions which proceed from constant contact with weapons specially adapted to, and usually worn for the purpose of, inflicting bodily harm to persons may come as well when the wearer is in his domicile as elsewhere. The only matter relied on to acquit the defendant is that he was in his home when carrying the pistol concealed upon his person, and that until the time of his arrest he was alone. This neither

avoids the operation of the statute nor excuses its violation: *Harmon v. State*, 69 Ala. 248; *Owens v. State*, 81 Ala. 387.

The judgment will be affirmed.

CARRYING CONCEALED WEAPONS.—One may be guilty of carrying a concealed weapon while on his own premises: *Carroll v. State*, 28 Ark. 99, 18 Am. Rep. 588.

HIGHLAND AVENUE & BELT R. R. CO. v. ROBBINS.

[124 Ala. 118, 27 South. 422.]

RAILROADS—TRESPASSERS—DUTY AS TO.—A railroad company is not bound to keep a lookout for trespassers on the track of its road, but a duty to such a trespasser sets in when his peril becomes apparent to the company's employes, who must then exercise all reasonable care and diligence to avoid injuring him.

RAILROADS—INJURIES FROM GREAT SPEED IN DENSELY POPULATED DISTRICTS.—Where trainmen have reason to believe that persons are likely to be on the track at points where people frequently pass, whether in cities or in densely populated neighborhoods in the country, in such numbers as to make dangerous the rapid running of trains without warning, the railroad company is answerable for an injury to a person, resulting from a high speed maintained under such circumstances and conditions. Under such circumstances, reckless indifference of consequences must be imputed to the trainmen, and the company is liable, not because its servants ought to have sooner observed the danger, but on the ground that they knew of its existence, from their knowledge of the presence of people at the place, as a matter of fact, without seeing them at all in the particular instance.

RAILROADS—TRESPASSERS.—ONE WHO CROSSES a railroad track, whether in a town or in the country, is not a trespasser.

RAILROADS—TRESPASSING CHILDREN—LOOKOUT FOR.—A railroad company is not bound to keep a lookout for children who are trespassers on its track.

NEGLIGENCE—ACTION FOR BY CHILD.—If an infant, suing for his own benefit in an action for personal injuries, is of such tender years that he is conclusively presumed to be incapable of judgment and discretion, and of owing duty to another, neither contributory negligence on his part nor that of his parent can be set up to defeat a recovery.

RAILROADS—TRESPASSERS—LIABILITY FOR INJURY TO.—If an adult sues a railroad company for personal injuries, and the complaint affirmatively shows him to have been a trespasser, an actionable injury is not shown unless it is averred to have been done wantonly or intentionally, or that the company's employes failed to use due care to avoid injuring him after he was discovered, and his peril of injury became apparent, or that such conditions existed, as to time and place, as made it necessary for the trainmen to keep a lookout.

NEGLIGENCE—CONTRIBUTORY—PLEA OF, AND ITS EFFECT.—A plea of contributory negligence can be interposed only to a complaint averring simple negligence; it is no answer to a complaint averring wantonness or willfulness on the part of the defendant.

NEGLIGENCE—TRESPASSERS—INFANTS AND INCOMPETENTS AS.—The fact that negligence cannot be imputed to a child of such tender years as to be without judgment or discretion does not alter the rule as to trespassers, whether adults or infants. A trespasser need not have judgment. He may be a discreet person, an infant, an idiot, or an animal.

RAILROADS—TRESPASSERS—PRESUMPTION.—When a railroad company is sued for personal injuries and the complaint does not show whether the plaintiff was a passenger or employé, or that he had any connection with the defendant, at the time of the injury, it will be presumed that he was a trespasser.

Action brought by Florence B. Robbins, an infant of nineteen months, to recover damages for injuries caused by the defendant's train. The railroad company appealed from an order overruling its demurrer to certain counts of the complaint.

Alexander T. London and John London, for the appellant.

Samuel Will John and Lee C. Bradley, for the appellee.

¹¹⁶ HARALSON, J. "It is generally, and we think correctly, held," says Elliott, "that a railroad company is not bound to keep a lookout for trespassers upon the track" of its road: 3 Elliott on Railroads, secs. 1255, 1257; Georgia Pac. R. R. Co. v. Ross, 100 Ala. 490, 14 South. 282; Memphis etc. R. R. Co. v. Womack, 84 Ala. 149, 4 South. 618; East Tennessee etc. R. R. Co. v. King, 81 Ala. 177, 2 South. 152. But a duty to such a trespasser sets in when his peril becomes apparent to the company's employés, and then they must exercise all reasonable care and diligence to avoid injuring him: Alabama etc. R. R. Co. v. Moorner, 116 Ala. 642, 22 South. 900.

In the case of Georgia Pac. Ry. Co. v. Lee, 92 Ala. 271, 9 South. 230, it was said: "That to run a train at a high rate of speed, and without signals of approach, at a point where the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district or city, or where the public are wont to pass on the track with such frequency and in such numbers—facts known to those in charge of the train—as that they will be held to a knowledge of the probable consequences of maintaining great speed without warning, so as to impute to them reckless indifference in respect thereto, would render their employer liable for in-

juries resulting therefrom, notwithstanding there was negligence on the part of those injured, and no fault on the part of the servants after seeing the danger. The doctrine is not based on the idea that they ought to have sooner observed the danger, but on the ground that they knew of its existence, of the presence of people in positions of peril, as a matter of fact, without seeing them ¹¹⁷ at all in the particular instance." This rule as thus stated, it was again said in *Nave v. Alabama etc. R. R. Co.*, 96 Ala. 264, 268, 11 South. 391, was in nowise in conflict with what was afterward declared in *Savannah etc. R. R. Co. v. Meadors*, 95 Ala. 137, 10 South. 141, as to the duty of trainmen, that "when running through a city, town, or village thickly populated, and the demands of trade and public intercourse and convenience necessitate the frequent crossing of tracks, and it is likely there are persons on the track at the time and place, to keep a lookout. The duty arises when the circumstances and conditions call for its exercise, and which are known to those operating the train."

This doctrine was again and more recently considered and approved in *Haley v. Kansas City etc. R. R. Co.*, 113 Ala. 640, 21 South. 357, where it was said: "There is no reason why this doctrine does not apply as well to densely populated neighborhoods in the country, when the conditions exist (to call it into exercise) as to cities, towns, and villages. It is the likelihood of peril to the safety of passers-by, known to defendant's employes, that makes the duty, and not the place itself: *Nave v. Alabama etc. R. R. Co.*, 96 Ala. 264, 268, 11 South. 391; *Georgia Pac. Ry. Co. v. Lee*, 92 Ala. 271," 9 South. 230; *Memphis etc. R. R. Co. v. Martin*, 117 Ala. 367, 23 South. 231.

Again, it is well settled that one in crossing a railroad track, whether in town or country, is not a trespasser: *Glass v. Memphis etc. R. R. Co.*, 94 Ala. 582, 10 South. 215. In the case last cited, in recognition and not in limitation of the foregoing principles, it was held "with respect to one, whether in town or country, and whether the track be upon an embankment, on a level, or in a cut, or through a tunnel, or over a trestle, who gets on a railroad for the purpose of passing, not across it, but along its course, and does proceed along its course, using it as a road, is essentially and at all times a trespasser, if he be not there by the sanction of the company," etc.

Recently, after mature consideration, consonant with what has gone before and with the great preponderance of authority

on the subject, and with what seems to be necessarily correct principle, we held that a railroad company is no more bound to keep a lookout for children who are trespassers or mere licensees on its track, not invited or enticed by it, than it is to keep a lookout for adult trespassers thereon: *Alabama etc. R. R. Co. v. Moorner*, ¹¹⁸ 116 Ala. 642, 22 South. 900; *Jefferson v. Birmingham Ry. etc. Co.*, 116 Ala. 294, 67 Am. St. Rep. 116, 22 South. 546.

Another doctrine well understood is, that if the infant suing for his own benefit is of such tender years that he is conclusively presumed to be incapable of judgment and discretion, and of owing duty to another, neither contributory negligence on his part nor that of his parent can be set up to defeat a recovery: *Government St. Ry. Co. v. Hanlon*, 53 Ala. 70; *Pratt Coal etc. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 South. 555.

Again, if a complaint affirmatively shows that the plaintiff is a trespasser, an actionable injury is not shown unless it is averred to have been done wantonly or intentionally, or that the company's employes failed to use due care to avoid injuring him after he has been discovered, and his peril of injury became apparent, or that such conditions existed as to time and place as made it necessary for the trainmen to keep a lookout. A complaint averring simple negligence is insufficient for the purpose: *Ensley Ry. Co. v. Chewning*, 93 Ala. 24, 9 South. 458; *Savannah etc. R. R. Co. v. Meadors*, 95 Ala. 137, 10 South. 141; *Glass v. Memphis etc. R. R. Co.*, 94 Ala. 582, 10 South. 215; *Georgia Pac. Ry. Co. v. Ross*, 100 Ala. 490, 14 South. 282; *Haley v. Kansas City etc. R. R. Co.*, 113 Ala. 640, 21 South. 357; *Louisville etc. R. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609.

A plea of contributory negligence is no answer to a complaint averring wantonness or willfulness on the part of defendant, and can only be interposed to a complaint averring simple negligence: *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21, 15 South. 511. If an adult plaintiff brings an action against a railroad company for personal injuries, not averring wantonness or willfulness on the part of defendant's employes in the infliction of the injury, the defendant may plead that he was guilty of contributory negligence, and, if proved, defeat the action. If an infant of tender years bring such an action, the defendant cannot set up the plea of contributory negligence, because such negligence can-

not be imputed to such a child. This arises from the very necessities of the case, the party in the one case being capable and in the other incapable of discretion. Negligence cannot be predicated of one without judgment or discretion. This, however, does not alter the rule as to trespassers, whether adults or infants. A trespasser need ¹¹⁹ not have judgment. He may be a discreet person, an infant, an idiot, or an animal. When the complaint shows that the party suing a railroad company for personal injuries was a trespasser at the time on the track of the company, the rule is inflexible—and we are unable to see how it could consistently be otherwise—that it must contain the averments above specified as essential in such a case. The decisions go even to the extent of holding on this subject that “the presumption of negligence [as was stated in *Ensley Ry. Co. v. Chewning*, 93 Ala. 24, 9 South. 458], of such a character does not arise from the mere fact of injury to a trespasser”; and when the complaint does not show whether the plaintiff was a passenger or employé, or that he had any connection with the railroad company at the time of the injury, it will be presumed that he was a trespasser: *Georgia Pac. Ry. Co. v. Ross*, 100 Ala. 490, 14 South. 282; *Ensley Ry. Co. v. Chewning*, 93 Ala. 24, 9 South. 458.

These views are not in contravention of the right of action given by statute against railroad companies for injuries done to persons or stock, at specified places, for a failure to comply with the requirements of sections 3440, 3441, and 3442, or with the burden of proof that is imposed in such cases on the defendant by section 3443 of the code: *Memphis etc. R. R. Co. v. Womack*, 84 Ala. 149, 5 South. 618; *Louisville etc. R. R. Co. v. Thornton*, 117 Ala. 274, 23 South. 773.

From what has been said it will appear without argument to show it that the several counts of the complaint, on which the case was tried, with the exception of the tenth and thirteenth, show that the plaintiff was a trespasser on defendant's track when she was injured, and fail to aver wanton or intentional injury to plaintiff by defendant's employés; or their failure to use due care to avert the injury after the discovery of plaintiff on the track; or that such conditions existed as to time and place of injury as imposed on them the duty to keep a lookout for trespassers.

The tenth avers that the plaintiff was injured when the plaintiff was on the track of defendant in Oak street, where it intersects defendant's track in a town or village; and the thirteenth,

that plaintiff was injured while she was attempting to cross the track of the defendant at a point without the limits of an incorporated city or town. ¹²⁰ Such allegations, together with the proper averments of negligence on the part of defendant's employes, under the principles above declared, must be held to make these counts sufficient and not subject to the demurrer interposed to them.

For overruling the demurrer to the other counts the judgment of the court below will be reversed and the cause remanded.

RAILROADS—DUTY OF, TOWARD TRESPASSERS ON TRACK.—An engineer in charge of a railway train does not owe a duty to trespassers to keep any special lookout for them: Note to *Burg v. Chicago etc. Ry. Co.*, 48 Am. St. Rep. 432; but there is a conflict of opinion as to this duty, and many cases hold that it is the engineer's duty to keep a lookout for their protection: Note to *Central R. R. etc. Co. v. Vaughan*, 30 Am. St. Rep. 54. It is the duty of the engineer to exercise ordinary care to avoid striking a trespasser upon the track: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692. A railroad company must exercise the utmost care and diligence to avoid running over a person on its track: Note to *Florida etc. R. R. Co. v. Foxworth*, 79 Am. St. Rep. 170.

RAILROADS—SPEED OF TRAINS—NEGLIGENCE.—The speed at which a railroad train may be run without negligence depends upon the dangers incident to the running of it: *Hicks v. New York etc. R. R. Co.*, 164 Mass. 424, 49 Am. St. Rep. 471, 41 N. E. 721. Greater caution is required in the country while passing places where it is known that persons are in the habit of crossing the track in necessarily going from one place to another, than is required while running in unfrequented and scantily populated sections: *Schexnadrye v. Texas etc. Ry. Co.*, 46 La. Ann. 248, 49 Am. St. Rep. 321, 14 South. 513. Compare *Atchison etc. R. R. Co. v. Hague*, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257; *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939.

RAILROADS—TRESPASSERS ON TRACK—LIABILITY FOR INJURING.—If a trespasser is injured on a railway track, the company is answerable only when it was done wantonly or willfully, or where it resulted from a degree of negligence equivalent to a wanton or willful injury: Notes to *Central R. R. etc. Co. v. Vaughan*, 30 Am. St. Rep. 54; *Atlanta etc. Ry. Co. v. Gravitt*, 44 Am. St. Rep. 181; *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692.

RAILROADS—TRESPASSING CHILDREN.—With respect to children of tender years and immature judgment, a railroad company owes to them the duty of keeping a reasonable lookout to discover whether they are on its track, as well as to avoid injury to them after they are seen: Note to *Burg v. Chicago etc. Ry. Co.*, 48 Am. St. Rep. 432. If the person in danger is seen or can be seen by those in charge of a train, injury must be avoided if possible, as humane treatment must be given even to trespassers, especially children non sui juris. The just and sensible rule, there-

fore, is that a defendant is answerable for an injury to a child which might have been avoided by the use of reasonable care: See the monographic note to *Barnes v. Shreveport etc. R. R. Co.*, 49 Am. St. Rep. 412, on negligence in dealing with children.

CONTRIBUTORY NEGLIGENCE IS NO DEFENSE to an action for injuries which result from gross negligence: *Western Ry. v. Mutch*, 97 Ala. 194, 38 Am. St. Rep. 179, 11 South. 894. The contributory negligence of the plaintiff does not preclude his recovery when the conduct of the defendant is wanton and willful, or where it indicates that negligence or indifference to the rights of others which must justly be characterized as recklessness: Note to *Galveston etc. Ry. Co. v. Zantzinger*, 71 Am. St. Rep. 866. A plea of contributory negligence is no answer to a complaint charging willful and wanton negligence: *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21, 15 South. 511.

RAILROADS—CHILDREN ON TRACK—INJURY—NEGLIGENCE OF PARENT—LIABILITY.—A railroad company is bound to exercise a high degree of caution where persons may be upon its track, and if by failure to do so a child of tender years is injured, the company is answerable in an action by the child, although its parent or custodian was negligent in permitting it to be on the track: Note to *Mason v. Southern Ry. Co.*, 79 Am. St. Rep. 886; *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145, 20 S. E. 550.

LEHMAN v. GUNN.

[124 Ala. 213, 27 South. 475.]

FRAUDULENT CONVEYANCES.—A VOLUNTARY CONVEYANCE by a debtor is, in law, fraudulent and void ~~per se~~ as to existing creditors, irrespective of the debtor's intention.

FRAUDULENT CONVEYANCES—GIFT OF LIFE INSURANCE.—If an insolvent takes out a policy of insurance on his life, payable to beneficiaries therein named, the subject matter of the voluntary conveyance or gift is not the premium paid by the insured but the policy, or the insurance which it represents. Such a transfer is fraudulent and void, as to existing creditors, without regard to the intention of the insured, and the donor's interest in the insurance will be postponed to their claims and demands, whether the debtor purchased the insurance for cash or on credit.

LIFE INSURANCE—CONTRACT OF—WHEN COMPLETE. If a person has taken out a policy of insurance on his life, the first premium being divided into two parts, a cash premium and a premium loan, and it appeared that the insured has given his personal check for the cash premium and his note for the premium loan, that the agent has remitted out of his own funds the amount of the cash premium to his company, and that the policy has been delivered, the contract of purchase of insurance is complete, though the agent retains the check as a claim against the insured. A vested interest in the insurance arises to the beneficiary, subject to the conditions and stipulations of the contract.

FRAUDULENT CONVEYANCES—GIFT OF LIFE INSURANCE—RIGHTS OF EXISTING CREDITORS.—When a debtor takes out a policy of insurance on his life, payable to beneficiaries

therein named, but paying the premium himself, the right of existing creditors to proceed against the fund created by the policy arises as soon as the insurance becomes due and payable, and cannot be defeated by the fact that an administrator of the debtor's estate gratuitously pays, out of his own funds, a check given by the insured in payment of a cash premium, for the purpose of preventing it from being presented as a claim against the estate.

LIFE INSURANCE—TRUST FUND FOR BENEFIT OF CREDITORS—ACCOUNTING.—When a debtor insures his life for the benefit of others, paying the premiums out of his own funds, the insurance, upon his death, becomes a trust fund for existing creditors, and all who deal with it, with notice, may be required to account.

H. K. White and James A. Mitchell, for the appellants.

H. C. Selheimer and A. Latady, for the appellees.

215 DOWDELL, J. The bill in this case is filed by the creditors of George T. Winton, deceased, and seeks to subject to the payment of their claims and demands as such creditors the proceeds of a policy of life insurance issued on the life of said Winton by the Mutual Benefit Life Insurance Company of Newark, New Jersey, in December, 1895, and in which said policy T. J. Winton and Sarah F. Winton, the father and mother of the insured, were named as beneficiaries. A motion was made to dismiss the bill for want of equity, which was sustained by the chancellor, and from that decree this appeal is prosecuted.

The bill charges that at the date of the issuance of the policy the said George T. Winton was indebted to complainants in the sums and manner alleged, and also that he was at that time wholly insolvent, and that the making of the policy payable to his father and mother was a voluntary conveyance or gift of the insurance covered by said policy, and therefore fraudulent and void as to creditors. The bill also avers that the policy was applied for, purchased, and received by the said George T. Winton, and that the premium thereon, which was divided into quarterly installments, was paid for in the following manner: The first installment, being for the sum of twenty-nine dollars and sixty-five cents, was divided into a cash premium of twenty dollars and seventy-six cents, and a premium loan of eight dollars and eighty-nine cents; that for the cash premium the insured gave to one Halstead, the local agent of the defendant company, and through whom the insurance was negotiated, his personal check on the Berney National Bank, with which the insured did his business, and for the premium loan executed

his promissory note to the insurance company. It is also averred that at the time of the giving of the check for the cash premium the said Halstead remitted the amount of the cash premium to his company out of his own funds, holding the check as his individual claim against the said George T. Winton. On the 15th of January, 1896, within a month after the policy was taken out, Winton died, and at the time of his death the check in question had not been paid, but for what reason is not stated in the bill. Letters of administration were granted in February, 1896, on the estate of Winton to the respondent, W. R. Gunn, who immediately entered upon the discharge of his duties as administrator. It is alleged that Gunn knew that his intestate's estate at that time was totally insolvent, and he was also notified and informed that the creditors were claiming the insurance covered by the policy in question, and it is also charged that the defendant insurance company likewise had knowledge of the claims of these creditors at the time and before it made the compromise settlement charged. Shortly after the grant of letters of administration the said Gunn sought out Halstead and took up the check which Winton had given, paying for the same out of his own funds, and it is charged in the bill for the purpose of preventing said check being presented as a claim against the estate of Winton. In March following the grant of administration the administrator Gunn, having the policy of insurance in his possession for collection, went to the state of Tennessee, where the beneficiaries named in the policy resided, and there received on said policy from an agent of the defendant company two thousand five hundred dollars, that being one-half of the amount of said insurance, in settlement of said policy, and delivered the said policy up to the company; that out of the two thousand five hundred dollars so collected he, Gunn, retained one thousand dollars, paying over the remainder, fifteen hundred dollars, to T. J. and Sarah F. Winton, the beneficiaries named in the policy. Subsequently the estate of George Winton was decreed insolvent, and a final settlement of his administration was made by Gunn, but no accounting was had by him for any money collected on said policy. The bill also charges that the settlement had by the insurance company ²¹⁷ with said Gunn and the beneficiaries in the state of Tennessee was a collusive one. We have not undertaken to set out here all of the averments of the bill, but only so much as we deemed necessary for the application of the legal principles involved in the controversy.

It will be observed from the foregoing statement of facts that there is nothing to bring the case within the influence of either section 2535 or 2607 of the code of 1896. The beneficiaries named in the present policy fall without the class of persons named in the former section; and the transactions, the subject of this suit, arose prior to the enactment of the latter statute. So the solution of this case must depend upon the law as it is, independent of these statutes.

As against existing creditors, a voluntary conveyance by the debtor is in law *per se* fraudulent and void, without regard to the intention of the debtor, is a proposition too familiar and well settled to require citation of authority. The nature and form of the conveyance, or the ways and means employed in bestowing the gift or donation, are immaterial. It is enough if the thing given be liable to the satisfaction of the demands of creditors to render the conveyance void.

In the solution of this case some difficulty will be obviated by first determining what it is that the debtor has conveyed or donated. It must be conceded that the benefits to be derived under the present policy by the beneficiaries named therein proceed from the acts of the insured, who procured the policy. The policy was issued by the company for a valuable consideration; the consideration moved from the insured and not from the beneficiaries. It cannot be doubted that if the policy had been taken out and payable to the estate of the insured, and subsequently by him transferred as a gift to his father and mother, that such a transaction would have been void as against existing creditors. So, too, though the policy be issued in favor of the father and mother, if the premiums be paid out of the funds of the debtor, will the transaction be void as against existing creditors: *Fearn v. Ward*, 80 Ala. 560, 2 South. 114; *Friedman v. Fennell*, 94 Ala. 570, 10 South. 649.

²¹⁸ It is contended by appellee, however, that as the check given by the insured to the agent Halstead was never paid out of the funds of Winton during his life, nor presented as a claim against his estate, but was gratuitously paid by the administrator Gunn out of his own funds, that no injury resulted to the creditors by any diversion of assets of the debtor, to which they had the right to look for the satisfaction of their demands; that fraud without injury affords no ground for relief to the creditor. It is a well-settled principle that fraud and injury must coexist to create a cause of action or ground for relief,

but the fallacy of appellee's contention rests in the misapprehension as to wherein the injury arises in the present case.

The policy or the insurance which it represented was the subject matter of the gift and not the premium; the premium is used in the purchase of the property donated, and it is in the gift of this property so purchased that the creditor complains that he has been injured. In *Fearn v. Ward*, 80 Ala. 560, 2 South. 114, this court said: "The insurance constitutes the property purchased, and is the subject matter of the investment. If the father be in debt, such voluntary investment is fraudulent in law as to his existing creditors, without regard to his intent, or to his circumstances and condition as to his ability to pay. In such case the donee will be regarded as a trustee for the benefit of the creditors of the donor": Citing *Caldwell v. King*, 76 Ala. 149; *Anderson v. Anderson*, 64 Ala. 403.

Under the facts in this case, when the policy was delivered to the insured, he having executed his note for the premium loan and given his check for the cash premium to the agent, which was held by the agent as a claim against the insured, he having paid out of his funds the cash premium to his company, the contract of purchase of insurance was complete, and a vested interest in the insurance arose to the beneficiary, subject, of course, to the conditions and stipulations contained in the contract. And if the beneficiary named in the policy be a mere donee, his interest in the insurance will be postponed to the claims and demands of existing creditors of the donor. The insurance being the subject ²¹⁹ matter of the gift by the debtor, as to the rights of creditors, it is immaterial whether the purchase of the insurance be made by the debtor for cash or on credit; the principle remains the same. The right of creditors to proceed against the fund for the satisfaction of their demands arises as soon as the insurance becomes due and payable under the stipulations of the contract of insurance. Under the present policy the insurance was payable at death, and upon the happening of that event the right of the creditors of insured to proceed to subject the insurance to the satisfaction of their debts arose. The payment by the administrator Gunn of the check given by Winton to Halstead could not, under the law, alter the terms of the contract of insurance or affect the rights of parties thereunder, nor could it impair the rights of creditors arising upon the death of Winton. It cannot be denied that if Winton had paid the premium in cash out

of his own funds that this would have been a diversion of assets to which his creditors had a right to look for the payment of their debts, and the fact that the amount in question was small cannot vary the principle. It is the diminution of the fund to which the creditor had the right to look for the payment of his demand that gives him the right to complain. The fund may be diminished by the improper diversion of assets which constitute it, or by fraudulently creating additional claims against it. In other words, the diminution may result by either diminishing the dividend or increasing the divisor. If the dividend be diminished by an improper diversion of his assets by the insolvent debtor, the creditor may in a court of equity follow the same into the hands of a donee or fraudulent grantee, and subject to his demand not only the assets themselves so diverted, but also the profits and increase growing or springing out of their use. So if the insolvent debtor, by way of credit, creates a valid claim against himself or his estate, thereby augmenting the divisor, which in effect is equivalent to diminishing the dividend, and at the same time making a donation to another of the property acquired by the credit given him, upon plain equitable principles the creditor should have the right to subject the property thus created and acquired in the hands of a donee or fraudulent grantee.

²²²⁰ It cannot be denied that when Winton received the policy of insurance and gave his check to Halstead, who immediately remitted out of his own funds the cash premium to the insurance company, that upon the dishonor of the check by the bank a valid claim or demand arose in favor of Halstead against Winton for the amount of the check or cash premium so paid. Halstead became the creditor of Winton for that amount, and the claim was a valid one against the estate of Winton at his death. He, Halstead, was entitled to share with other creditors in the assets of the common debtor's estate. The shares of the other creditors were thereby diminished by the augmentation of the divisor through the fraud, actual or constructive, of the debtor. If the wrong and injury to the creditor be accomplished through the fraud of the debtor, actual or constructive, it is immaterial what form it assumed; equity will deal with the facts, the substance, without regard to forms or shadows. Halstead held the dishonored check as a claim against the common debtor, Winton, and after his, Winton's, death, Gunn, the administrator of Winton's estate, paid this debt. It is insisted that inasmuch as the claim was never filed against the estate, and having been

gratuitously paid by Gunn out of his own funds, that no injury resulted to the creditors. As we have said above, the rights of the creditors to proceed against the fund arose upon the death of Winton, and of which they could not be deprived by the gratuitous act of the administrator, whose duty it was to collect and preserve the assets of his intestate's estate for the benefit of creditors. If the right of the creditor to subject the fund to his demand arose upon the death of Winton, then it became a vested right, and its termination or continuance did not, and could not, depend upon the mistaken generosity of the administrator in the gratuitous payment out of his own funds of Halstead's claim. Our attention has been directed by counsel for appellee to the case of *Roberts v. Winton*, 100 Tenn. 484, 45 S. W. 673. It appears from the opinion in that case that the insurance was purchased with property exempt to the debtor under the law. That is a question not presented by the record in this case, and we decline to express any ²²¹ opinion upon it. The reasoning employed by the court in *Roberts v. Winton*, 100 Tenn. 484, 45 S. W. 673, upon the proposition of a purchase by an insolvent debtor of life insurance on a credit basis is not in harmony with the views we have hereinabove expressed, and we therefore decline to follow that case as authority.

Taking the allegations of the bill as true, upon the death of Winton the insurance became a trust fund for the benefit of his creditors, and all parties dealing with such a fund with notice may be held to an accounting. The chancellor erred in sustaining the motion to dismiss the bill for want of equity and the decree must be reversed.

Reversed and remanded.

Sharpe, J., not sitting.

FRAUDULENT CONVEYANCES.—A VOLUNTARY CONVEYANCE IS VOID as to existing creditors, under all circumstances, irrespective of the intention of the parties: *Wooten v. Steel*, 109 Ala. 563, 55 Am. St. Rep. 947, 19 South. 972; and see note to *Yeend v. Weeks*, 53 Am. St. Rep. 62.

LIFE INSURANCE—CONTRACT OF, WHEN COMPLETE.—A contract of life insurance is complete when nothing further remains to be done to give either party a right to have it carried into effect: See the monographic note to *New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 143-153, discussing the subject.

LIFE INSURANCE—VOLUNTARY ASSIGNMENT OF—VALIDITY—RIGHTS OF CREDITORS.—Some of the cases, while recognizing the doctrine that a husband, whether insolvent or not, may take out and maintain life insurance in the name and for the benefit of his wife or children, or both, free from the claims of creditors,

still hold that a voluntary assignment to his wife and children, by an insolvent husband, of a life insurance policy payable to himself, etc., is fraudulent and void, and that the insurance money may be reached in equity by creditors, and subjected to the payment of their debts: See the monographic note to *Hise v. Hartford Life Ins. Co.*, 29 Am. St. Rep. 360, 365, showing when insurance on life is a fraud on creditors. That an assignment or gift of a life insurance policy by an insolvent husband to his wife is valid as against his existing creditors, see *Barron v. Williams*, 58 S. C. 280, 79 Am. St. Rep. 840, 36 S. E. 561.

ALABAMA GREAT SOUTHERN R. R. CO. v. REED.

[124 Ala. 253, 27 South. 19.]

STATUTES — CONSTITUTIONALITY — PRESUMPTION.—Every legislative act is presumed to be constitutional, and every intendment must be indulged by the courts in favor of its validity.

STATUTES—EXPRESSION OF SUBJECT IN TITLE.—The provision of a constitution declaring that "each law shall contain but one subject, which shall be clearly expressed in its title, etc.," is satisfied when the title of an act expresses but one general subject, and all its provisions are allied to the subject expressed, or, as is usually said, germane or cognate to it.

STATUTES—EXPRESSION OF SUBJECT IN TITLE—ILLUSTRATION OF.—An act entitled, in substance, an act to authorize the court of county commissioners of a designated county to issue bonds and to dispose thereof "for the purpose of securing means" for building and furnishing a courthouse, and for building an addition to the county jail, does not offend a provision of the constitution requiring each law to contain but one subject, which shall be expressed in its title. The legislature has a right to provide any method for securing such means, and may authorize the levy of a special tax wherewith to pay the interest on the bonds and the principal at maturity, for such method is cognate to the subject expressed in the title of the act.

Action against Reed to recover money paid under protest to the defendant as tax collector. The court gave the affirmative charge to the defendant. There was a judgment for the defendant and the company appealed.

A. E. Goodhue, for the appellant.

Davis & Haralson, for the appellee.

254 TYSON, J. The complaint contains two counts, each founded upon an account for money had and received by the defendant to plaintiff's use. The first count seeks a recovery of fourteen hundred and forty-five and fifty-six one-hundredths dollars, paid by the plaintiff to the defendant under protest and compulsion. Of this amount one thousand and eighty-four

and seventeen one-hundredths dollars was paid on account of a special tax levied by the court of county commissioners "of three-twentieths of one per centum on all the taxable property in the county for the purpose of paying semi-annual interest on county bonds, and for the purpose of building a bridge across Town creek at Chovies," exclusive of the one-half of one per centum permitted to be levied under the constitution. The remainder of the fourteen hundred and forty-five and fifty-six one-hundredths dollars, to wit, three hundred and sixty-one and thirty-nine one-hundredths dollars, paid by plaintiff to the defendant, as was the three hundred and sixty and three one-hundredths dollars claimed in the second count of the complaint, was on account of the special school tax levied for the years 1897 and 1898.

²⁵⁵ Under article 11, section 5, of the constitution, "no county in this state shall be authorized to levy a larger rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum; provided, that to pay debts existing at the ratification of this constitution an additional rate of one-fourth of one per centum may be levied and collected, which shall be exclusively appropriated to the payment of such debts or the interest thereon; provided further, that to pay any debt or liability now existing against any county, incurred for the erection of the necessary public buildings or other ordinary county purposes, or that may hereafter be created for the erection of necessary buildings or bridges, any county may levy and collect such special taxes as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

The right to require the plaintiff to pay the one thousand and eighty-four and seventeen one-hundredths dollars depends in a measure upon the constitutionality of the act of the general assembly approved February 5, 1891 (Acts 1890-91, p. 359), entitled "An act to authorize the court of county commissioners of De Kalb county to issue bonds of said county to an amount not exceeding thirty thousand dollars, and to dispose of the same for the purpose of securing means for building a courthouse and furnishing the same with suitable furniture, and for building an addition to the county jail of said county."

Section 1 of this act provides "that for the purpose of securing the means for building a courthouse and furnishing the same with suitable furniture, and for building an addition to

the county jail for De Kalb county, the court of county commissioners for said De Kalb county is hereby authorized and empowered to issue and dispose of bonds of said county to the amount of thirty thousand dollars, or so much thereof as said court may deem necessary, payable in twenty years from said date of issuance, etc."

Section 2 provides that the bonds may be in such sum and shall be made payable at such place or places as the court may direct, and that they shall not be valid ²⁵⁶ until signed by the county treasurer and countersigned by the judge of probate, etc.

Section 3 authorizes the court of county commissioners by a majority vote to do any and all things necessary to carry in effect the provisions of the act at any term of the court, whether regular or special, etc.

Section 4 provides "that said court is hereby authorized to levy a special tax from time to time as may be necessary to pay the interest on said bonds, and to pay the principal at maturity."

It is not questioned that the legislature has the power, under the section of the constitution above quoted, by proper enactment to authorize a special tax to be levied by the court of county commissioners to pay the bonds or interest thereon evidencing an indebtedness created by the county for the erection of the courthouse and an addition to the county jail. The chief objection, and we may add the only plausible one, taken to the constitutionality of the act is that it offends section 2 of article 4 of the constitution, which declares that "each law shall contain but one subject, which shall be clearly expressed in its title, etc."

The object to be accomplished in embodying this clause in the constitution has been so often declared by this court that it will serve no good purpose to repeat it here: *Ballentyne v. Wickersham*, 75 Ala. 533; *Randolph v. Builders' etc. Supply Co.*, 106 Ala. 507, 17 South. 721; 3 *Brickell's Digest*, 132, sec. 84. This limitation upon the exercise of the legislative power in the enactment of laws is not exempt from the general rule that it is only a clear violation of the constitution which will justify the courts in overruling the legislative will. Every legislative act is presumed to be constitutional, and every indictment must be indulged by the courts in favor of its validity. In determining the question here under consideration this court said in the case of *State v. Street*, 117 Ala. 208, 23 South. 807: "When the title of an act expresses but one general subject,

and all its provisions are allied to the subject expressed, or, as is usually said, germane or cognate to it, all the purposes of the limitations are satisfied. This is the real test in each particular case: When the title expresses one general subject, however ²⁵⁷ broad and comprehensive the subject may be, whether the act includes provisions which can by no fair intendment be considered as having connection or relation to the subject expressed."

In the case of *Ex parte Pollard*, 40 Ala. 99, it is said: "The question must always be, whether, taking from the title the subject, we can find anything in the bill which cannot be referred to that subject. If we do, the law embraces a subject not described in the title. But this conclusion should never be attained except by argument characterized by liberality of construction and freedom from all nice verbal criticism."

The leading thought in the title of the act in question, when compared and construed with the act, is obviously the one expressed in the language, "for the purpose of securing means for building a courthouse and providing the same with suitable furniture, and for building an addition to the county jail of said county": *Judson v. Bessemer*, 87 Ala. 248, 6 South. 267; *Block v. State*, 66 Ala. 493. The authorization to the court of county commissioners to issue bonds of the county to an amount not exceeding thirty thousand dollars, and dispose of them, was only a method adopted to secure the means, and might with all propriety have been left out of the title without in anywise impairing the validity of the act. And had the title of the act contained only these words, the authority conferred upon the court of county commissioners to issue the bonds and dispose of them would certainly have been germane to the purpose of securing the means. And so, too, any other method provided by the act of securing the means for building a courthouse, etc., would be cognate. Nor was the legislature confined to one method only in providing for securing the means, but had the right to provide as many methods for the full accomplishment of the object sought to be attained as in their wisdom they deemed expedient, provided the clause of the act adopting the methods be so correlated to the subject expressed in the title as to appear to follow as a natural and legitimate complement: *Ex parte Mayor etc. of Birmingham*, 116 Ala. 186, 22 South. 454.

One of the methods of securing the means for building the courthouse, etc., as provided by the fourth section ²⁵⁸ of the

act under consideration, which is the one assailed here as unconstitutional, is the authority conferred upon the court of county commissioners to levy a special tax to pay the interest on the bonds and to pay the principal of the bonds at maturity. Had the levy of the special tax been directed for the purpose of securing the means and, when collected, to be applied to the building of the courthouse, been the only method provided by the act under the title construed as we here construe this one, no question could arise as to its constitutionality. Does the mere fact that the tax, when collected, shall be applied to the payment of interest on and the principal of the bonds render the method any the less a method to secure the means for building the courthouse, etc.? We think not. It is the natural and logical complement of rounding out a completion of the purpose declared by the act, to wit, of securing the means to construct the buildings designated in the act.

In the case of *Hare v. Kennerly*, 83 Ala. 608, 3 South. 683, the same objection as here was made to the constitutionality of the act (Acts 1880-81, p. 329), entitled an act "to adopt and carry into effect the plan for the adjustment and settlement of the existing indebtedness of the late corporation known as the 'mayor, aldermen, and common council of the city of Mobile,' which is recommended in the report of the 'commissioners of Mobile,' made and laid before the general assembly of Alabama on the twenty-sixth day of November, 1880, as provided in section sixteen (16) of an act of the general assembly of Alabama, entitled 'An act to vacate and annul the charter and dissolve the corporation of the city of Mobile, and to provide for the application of the assets thereof in discharge of the debts of said corporation.' " By the provisions of the act the commissioners of Mobile were authorized to issue bonds, dispose of them by sale, or exchange for outstanding bonds, and a special tax was levied and provision made for the application of the money collected under the levy to pay off the bonds. In addition to this, provisions were made for the assessment of property, collection of taxes by giving a lien therefor, proceeding for the enforcement of the lien by sale, tax deeds to purchasers, method by which collector was to be made accountable, ²⁶⁹ etc. Justice Somerville, speaking to the question here involved, said: "The general subject of this law is the adjustment and settlement of the existing indebtedness of the late corporation known as the 'mayor aldermen, and common council of the city of Mobile.' Everything contained in the act or expressed in the title is strictly

cognate to this subject. . . . We have often said that this clause of the constitution 'is not violated by any legislative act having various details properly pertinent and germane to one subject': *Ex parte Upshaw*, 45 Ala. 234; *Board of Revenue v. Barber*, 53 Ala. 389, 25 Am. Rep. 611.

Nor has section 31 of the fourth article of the constitution any application to the act, nor is it a limitation of the legislative power exercised in its enactment: *State v. Street*, 117 Ala. 208, 23 South. 807.

The remaining contention against the constitutionality of the statute is that it contains the provision for furnishing the courthouse with suitable furniture in violation of the provision of the clause of the constitution first above quoted, since that limits the power of the legislature to levy a special tax to pay such debts created by the county for the erection of necessary public buildings. In this we cannot concur. The authorization to levy a tax to erect a courthouse includes and confers the authority to provide for furnishing it with suitable furniture.

It is suggested, however, that notwithstanding the act is constitutional, the levy of three-twentieths of one per cent is void, for the reason that it includes in it a provision for the building of a bridge. No argument is made in support of it in appellant's counsel's brief, and as he did not deem it of sufficient importance to urge it, we will not consider it further than to say that it is untenable.

The act authorizing the levy of the special tax for school purposes is constitutional, and the amount paid by plaintiff on that account cannot be recovered back: *Southern Ry. Co. v. St. Clair Co.*, 124 Ala. 491, 27 South. 23.

There is no error in the record, and the judgment must be affirmed.

STATUTES — CONSTITUTIONALITY — PRESUMPTION.—All intendment is in favor of the constitutionality of every statute passed with the requisite form and ceremony: *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 703, 48 S. W. 305.

STATUTES—EXPRESSION OF SUBJECT IN TITLE—VALIDITY.—All legislation that is germane to the subject expressed in the title of an act is within the title and permissible under it: *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033. See the monographic notes to *Crookston v. Board of County Commrs.*, 79 Am. St. Rep. 456, showing when the title of a statute embraces but one subject, and what may be included thereunder; and to *Bobel v. People*, 64 Am. St. Rep. 70-107, on the sufficiency of the title to a statute.

WARD v. DEADMAN.

[124 Ala. 288, 26 South. 916.]

CONSTABLES—DUTY OF, IN LEVY OF EXECUTION.—A constable is bound to obey the mandate of an execution placed in his hands, if the writ is regular on its face and issued by competent authority, whether the judgment supporting it is regular or irregular.

CONSTABLES—LEVY OF EXECUTION—PROTECTION OF WRIT—VOID JUDGMENT.—An execution, regular on its face protects a constable in obeying its mandate, though issued on a void judgment.

CONSTABLES—LEVY OF EXECUTION—WHAT INDORSEMENT IS A MANDATE.—The words "no personal property exempt from levy and sale," indorsed by a justice of the peace on an execution issued to a constable, constitute a mandate which the officer may obey without being guilty of trespass in so doing, though the judgment is void.

CONSTABLES—INDORSEMENT ON EXECUTION, WHEN MAY BE OBEYED.—A constable who receives a writ of execution to levy is not bound to look beyond an indorsement thereon of "no personal property exempt from levy and sale" further than to know that the execution was issued by a court of competent jurisdiction.

Action by Deadman against Ward and others for an alleged trespass. A demurrer to the complaint was overruled and the defendants appealed.

Grayson & Foster and Jere Murphy, Jr., for the appellants.

Jancred Betts, for the appellee.

289 TYSON, J. This is an action for damages brought by a defendant in an execution against the constable and the sureties upon his official bond, for an alleged trespass committed by the constable in levying the execution upon certain personal property of the plaintiff and selling it to satisfy said execution.

The alleged trespass is predicated upon the taking of the property, which it is alleged was exempt from levy and sale, after the plaintiff had filed in the office of the judge of probate his claim of exemptions.

The complaint sets out the execution in haec verba under which the constable acted and this indorsement thereon, "No personal property exempt from levy and sale." The inference to be drawn from the allegation of the complaint is, that the execution was issued by competent authority, since it appears from the averments that it was issued by a justice of the peace (naming him), and no question is raised as to his want of au-

thority in doing so. Furthermore, the execution is regular on its face. Being regular on its face and issued by competent authority the constable was bound to obey its mandates and this he was compelled to do without reference to whether the judgment supporting it was regular or irregular. If the judgment was void, the constable could have availed himself of this as a defense for not obeying its mandate; but in such case the execution will operate to protect him in its execution: *Bender v. Graham, Minor*, 269; *Wilson v. Sawyer*, 37 Ala. 631; *Martin v. Hall*, 70 Ala. 421; *Clark v. Lamb*, 76 Ala. 406.

In the execution of this process the constable was ²⁹⁰ justified whatever may have been the defect in the proceeding on which it was issued: Code, sec. 1807; *Meyer v. Hearst*, 75 Ala. 390.

The question is, Was the indorsement made by the justice upon the execution, "No personal property exempt from levy and sale," a mandate to the constable which he was bound to obey, or if he did obey was he protected by it?

Section 2107 provides that: "In any suit at law or in equity, in which a waiver of the right of homestead or other exemption is sought to be enforced, the fact of waiver and its extent must be averred in the complaint, petition, or bill, and by appropriate pleading may be controverted; and if such averment is sustained, the fact of waiver and its extent must be declared in the judgment or decree, and indorsed on the execution or other process thereon; and such waiver shall extend to the cost of the suit."

It is evident that it was the legislative intention in requiring the indorsement of the fact of waiver and its extent upon the execution to give to the plaintiff in execution the benefit of his judgment in this respect, by having the officer whose duty it is to levy the execution to do so in accordance with the provisions of the indorsement. It afforded information to the officer that as against the judgment and cost the defendant in execution was not entitled to claim as exempt the property mentioned in the indorsement, and was a command to him to disregard any claim made by the defendant in contravention of the terms of the indorsement. Such an indorsement is just as much a mandate to the constable or other officer who is chargeable with the execution of the process as any other command contained in it, and his duty to obey it as binding. His obedience to this command is justified under the same provision of the statute which justifies his obedience to other mandates of the process which he is legally bound to execute. It is of no consequence

in this case whether or not the pleading contained an averment of a waiver of exemptions of personal property by the defendant in execution or the judgment entry disclosed the fact of such waiver. The constable was not bound to look beyond the indorsement ²⁰¹ upon the execution other than to know that the execution was issued by a court of competent jurisdiction: *Clark v. Lamb*, 76 Ala. 406; *Spear v. State*, 120 Ala. 351, 25 South. 46; *Brown v. State*, 109 Ala. 89, 20 South. 103; 22 Am. & Eng. Ency. of Law, 529, 530, notes.

If the indorsement was made upon the execution without authority as between the parties, or as against a purchaser of the property at a sale under it, it may be that the defendant in execution would be allowed to show its invalidity. It is very certain that he could have had the indorsement stricken or quashed, upon proper motion. But so long as it was permitted to remain upon the execution it was a command which the constable was bound to obey, unless the judgment was void, and he cannot be held to be guilty of trespass in the doing of an act which he was compelled to do. If the judgment was void, and he obeyed the mandate, he is protected. The case of *McDaniel v. Johnston*, 110 Ala. 531, 19 South. 35, relied upon by appellee, is not in conflict with the views here expressed, and the principles there declared have no application to the question here involved.

The demurrer to the complaint should have been sustained.

The judgment must be reversed and the cause remanded.

OFFICERS—HOW FAR PROTECTED BY PROCESS.—An officer, sued for taking property, may justify by showing an execution against his adversary, which is regular upon its face: *Clay v. Caperton*, 1 T. B. Mon. 10, 15 Am. Dec. 77. Process valid on its face, and showing jurisdiction, protects an officer, if nothing appears to apprise him of a want of jurisdiction: Note to *Hamner v. Ballantyne*, 57 Am. St. Rep. 740. A sheriff has nothing to do with the propriety of the process under which he acts, provided the court had jurisdiction, and the process is regular upon its face: *Keniston v. Little*, 80 N. H. 818, 64 Am. Dec. 297.

BLANKENSHIP v. BLACKWELL.

[124 Ala. 855, 27 South. 551.]

ABATEMENT—SPECIAL PLEA, WHEN NECESSARY.—Matter of abatement in a suit by attachment requires a special plea. A motion to “abate” is not sufficient.

ABATEMENT.—A PLEA IN ABATEMENT COMES TOO LATE when it is not filed until the case has been brought into a circuit court by appeal from a justice’s court.

PLEADING—AMENDMENTS ALLOWABLE.—In an action by attachment it is proper to permit the plaintiffs to amend their complaint by adding new parties plaintiff, and by changing the capacity in which the plaintiffs sue from individuals to assignees.

EVIDENCE—ADMISSIBILITY.—WHEN THE GENERAL ISSUE is pleaded, the onus is cast upon the plaintiff of proving every material allegation of the complaint. No evidence is properly admissible in behalf of the plaintiff which does not tend to support the averments of the complaint, and the defense is limited to evidence in disproof of such averments.

LANDLORD AND TENANT—ESTOPPEL TO DISPUTE TITLE.—In an action to recover rent, where the complaint sets out the rental contract and its assignment to the plaintiffs, proof of title is not required of the landlord or his assignees. If the relation of landlord and tenant is proved, the tenant is estopped from disputing his landlord’s title.

LANDLORD AND TENANT—ACTION FOR RENT—PARAMOUNT TITLE AS A DEFENSE.—If the plaintiff, in an action for rent, fails to establish such a valid lease as the law requires to operate as an estoppel against the alleged tenant, such tenant will, in certain cases, be allowed to set up a paramount title in himself, or out of the lessor.

LANDLORD AND TENANT—ESTOPPEL.—THE ACCEPTANCE OF A LEASE BY ONE ALREADY IN POSSESSION works no estoppel in any case, as between landlord and tenant, where such acceptance was induced by fraud, mistake, misapprehension of the facts, duress, or other improper means used by the lessor; and, in the absence of such improper means upon the lessor’s part, the acceptance of a lease by one in possession works no estoppel after the term has expired.

Grayson & Foster, for the appellant.

S. S. Pleasants, for the appellee.

357 DOWDELL, J. This was an action of attachment for rent, originally sued out by R. T. Blackwell against Clarence Blankenship before a justice of the peace, who rendered judgment in favor of the plaintiff, and the defendant appealed to the circuit court. Said R. T. Blackwell filed a complaint in the circuit court in words as follows: “Plaintiff claims of the defendant one hundred dollars due by account for rent of land

for the year 1895"; and later he amended said complaint by adding thereto as additional parties plaintiff Eliza Blackwell et al. and a further amendment was added, as follows: "And said rent is due plaintiffs as assignees of the reversion, and said reversion was conveyed to plaintiffs on October 28, 1895, by deed, in words and figures as follows," setting out a deed from William B. Lee and Kitty Lee, his wife, to plaintiffs, to certain lands therein described. The case was tried in the circuit court de novo and without the intervention of a jury. The defendant filed the following motion: "Comes the defendant and moves the court to abate the attachment in this case because the writ of attachment is issued against the estate of Clarence Blankenship. And the defendant avers that the crop levied on by reason of this attachment writ was not raised on the lands for the use of which rent is here sued." The defendant also moved the court to strike from the file the amendments above set forth to the original complaint. Both motions were overruled, over the objection of the defendant, who duly excepted to such rulings. The only plea filed by the defendant was, in legal effect, the general issue. A judgment was rendered in favor of the plaintiff, and the appellant, defendant in the court below, now assigns as error the overruling of the above-mentioned motions and the rulings of the trial court on the evidence.

The contention of counsel for appellant that the attachment should have been abated on the plea filed assumes that the absence of which rendered the ruling of the court correct, for this matter for a plea in abatement, or for a motion to vacate, quash, or set aside, was presented by the defendant in the shape of a motion to "abate." In the very authority cited by counsel for appellant supporting his contention, viz., *Ellis v. Martin*, ³⁵⁸ 60 Ala. 394, the court, by Brickell, C. J., says: "If [the attachment] issued against the estate generally, it would be abated on plea, and a levy on other property than the crops grown on the rented premises would be set aside." Matter in abatement requires a special plea. Defects in the writ, or apparent on the face of the affidavit or bond, may be raised by motion to quash or vacate. As a plea in abatement it came too late. It was never filed until the case was brought into the circuit court by appeal from the judgment of the justice court.

Our statutes allowing amendments, and the decisions of this court construing the same, are very liberal. Section 3331 of

the code of 1896 provides that the court, whilst the cause is in progress, must "permit the amendment of the complaint by striking out or adding new parties plaintiff, or by striking out or adding new parties defendant, upon such terms and conditions as the justice of the case may require." In the case of *Southern Express Co. v. Boullemet*, 100 Ala. 278, 18 South. 941, this court, speaking through McClellan, J., says: "The only limitation upon the right of amendment of complaints in respect to striking out and adding new parties is that an entire change of parties cannot be wrought thereby. Even a change of the capacity in which the plaintiff sues is not forbidden, though formerly it was held otherwise"; citing *Lucas v. Pittman*, 94 Ala. 616, 10 South. 941, where it was held that a plaintiff may amend his complaint so as to sue as an administrator instead of as an individual, or vice versa. Another limitation upon such amendments, well settled by the decisions, is that they will not be permitted when they result in a complete change of the subject matter or cause of action involved in the suit. It is clear that there can be no merit in the insistence that R. T. Blackwell could not be permitted to amend his complaint by adding new parties plaintiff; and the objection to his further amending, by changing the capacity in which the plaintiffs sued from individuals to assignees, must also fall. For these amendments did not result in a complete change of the parties plaintiff, the original plaintiff being retained and included in the amended complaint. The character and capacity of the plaintiffs were not changed by the amendment. The ³⁵⁹ addition of the words "as assignees," etc., merely showed how they derived their right to the rent. Nor can the contention of appellant that these amendments wrought a complete change in the subject matter and cause of action be sustained. The complaint as amended still shows the same cause of action declared on in the original complaint, i. e., a claim against Clarence Blankenship "for rent of land for the year 1895," the amendment, in so many words, claiming "said rent," as declared on in the original complaint. The case of *Leatherwood v. Suggs*, 96 Ala. 383, 11 South. 415, cited by appellant, which was an action for forcible entry and detainer, is not a case in point, for in that case the amendment, held by this court to have been properly disallowed by the city court, attempted to show a forcible entry and detainer of other and different lands than those involved in the original action in the justice court, where judg-

ment was rendered in favor of the defendant. From this judgment the plaintiff appealed to the city court, where he attempted to introduce by way of amendment a new cause of action with an entire change of subject matter; this upon an appeal from the only court having original jurisdiction of the cause of action. In the case of *Southern Express Co. v. Boullemet*, 100 Ala. 278, 13 South. 941, it was held that an amendment was properly allowed by which the action was converted from the individual suit of Boullemet upon a verbal contract to the partnership suit of Boullemet & Perkins, which amendment changed the number of the parties plaintiff, as well as the parties to the contract as originally sued on in the justice court, but the subject matter and terms of contract remained the same.

The assignments of error, numbered 3 to 15, inclusive, are directed to the rulings of the trial court upon the evidence; and preparatory to a consideration of such rulings we will revert briefly to the issues involved in this action. The rule is well settled that where the general issue is pleaded, the onus is cast upon the plaintiff of proving every material allegation of the complaint. No evidence is properly admissible in behalf of plaintiff which does not tend to support the averments of the complaint, and the defense is limited to evidence ^{see} in disproof of such averments. The material allegations of the complaint in this case, briefly put, are: 1. The rental contract between plaintiff's assignor; and 2. Its assignment to plaintiffs. In such an action, proof of title is not required of the landlord or his assignees, for the lease being established—the relation of landlord and tenant having been proved—the tenant is estopped from disputing the title of his landlord, and upon a failure on the part of the plaintiff to prove such lease, he could not recover. However, when the plaintiff fails to establish such a valid lease as the law requires to operate an estoppel against the alleged tenant, such tenant will, in certain cases, be allowed to set up a paramount title in himself, or out of the lessor: See *Taylor on Landlord and Tenant*, secs. 705-708; *Bishop v. Laloutee*, 67 Ala. 201; *Farris v. Houston*, 74 Ala. 167.

Three deeds were offered in evidence by the plaintiff in making out his case under the complaint, which were admitted over the objection of the defendant. The two first admitted purported to be deeds from the plaintiffs to William Lee, conveying to him the lands for the use of which rent was claimed;

and the third deed was the deed set out in the complaint, in which William B. Lee reconveyed the same land to the plaintiffs. The last-named deed was admissible as evidence of the assignment of the reversion, carrying with it the rent, as alleged in the complaint. But we fail to see the relevancy of the two deeds from plaintiffs to William Lee, whose right of property was not averred by the complaint, nor put in issue by the plea of the general issue—the only plea filed by the defendant. In our opinion, the court erred in admitting these two deeds in evidence. For the same reason, there was error committed in allowing the plaintiff to testify that the land formerly belonged to one George W. Jones; that said Jones went into possession of said land in 1858; that the plaintiffs were the heirs at law of said Jones, and that plaintiffs sold said lands to William Lee.

Several of the assignments of error are based upon the exclusion by the court of certain evidence offered by the defendant for the purpose of showing title in a third party paramount to that of his alleged lessor, and this ³⁶¹ brings us to a consideration of the question as to what constitutes such an estoppel as will preclude the defendant in an action of this nature from attacking the title of plaintiff, or him under whom plaintiff claims. It will be noticed that while proof of title is not required of plaintiff in making out his case under the complaint, the defendant will, in some cases, be allowed, in support of his denial of the alleged lease or its validity, to dispute the title of the alleged lessor. It now becomes pertinent for us to inquire whether the defendant may be permitted to pursue this course in the case at bar.

The general principle of estoppel, as between landlord and tenant, “operates only to preclude the tenant from disputing the title of the landlord at the time when the lease was made and possession given.” As was said by Brickell, C. J., in the case of *Farris v. Houston*, 74 Ala. 167: “There are various exceptions to, and qualifications of, the rule which are of as much importance as the rule itself, and which must be observed in the administration of justice between landlord and tenant.” In considering this question it is well to notice, first, that “a distinction is made between cases where the party has received possession from the lessor, and where he has merely admitted his title by paying rent, attorning, or even by taking a lease. In the former case he is estopped from denying the lessor’s title in any event; but in the latter the defendant may

rebut the presumption arising from such payment by showing that he paid rent under a mistake, or through misrepresentation. Even an express agreement with one who claims to be landlord does not preclude the tenant from afterward showing that the party claiming had no title; and that the payment or other acknowledgment was induced by misrepresentation or under mistake, the tenant not having been originally let into possession by the claimant": Taylor on Landlord and Tenant, sec. 707 (cited approvingly by this court in the case of *Farris v. Houston*, 67 Ala. 201); Bigelow on Estoppel, 356; *Shelton v. Carroll*, 16 Ala. 153. The principle, as stated above, is qualified in some respects by the conclusions reached in the case of *Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60, 61, where this question is exhaustively treated ³⁶² and the conflicting decisions of the courts thereon reviewed. The doctrine as there stated is that, in the case of a tenant already in possession, "acceptance induced by fraud, mistake, misapprehension of the facts as to the state of the title, or by duress or other improper means used by the lessor, works no estoppel." In this case it is further held that, in the absence of fraud, mistake, imposition, or duress, the bona fide acceptance of a lease by one in possession works an estoppel to deny title in his lessor "at least until the term expires." In the light of these authorities there can be no serious doubt of the correctness of the following propositions: 1. The acceptance of a lease by one already in possession works no estoppel in any case where such acceptance was induced by fraud, mistake, misapprehension of the facts, duress, or other improper means used by the lessor; and that 2. In the absence of fraud, mistake, misapprehension, duress, or other improper means upon the part of the lessor, the acceptance of such a lease by one in possession works no estoppel after the term has expired. In addition to the authorities above quoted, this position is sustained in 12 Am. & Eng. Ency. of Law, 704, 705; 2 Greenleaf on Evidence, sec. 305; 2 Smith Lead. Cas. 752.

We will here advert to the fact that the evidence introduced in behalf of plaintiffs fails to show that the defendant was put into possession by plaintiffs' assignor, William B. Lee, but the evidence of Lee himself—the only evidence offered by plaintiffs upon this point—creates a reasonable presumption that at the time of the alleged lease the defendant was the tenant in possession under a rental contract already made with a third party. The broad assertion made by said Lee

on his direct examination that he rented the land to the defendant and put him in possession is not warranted by the facts further testified to by him. These facts are, in substance, that he went into the possession of said land in February, 1895, under a purchase from the plaintiffs, and went to clearing a part of said land when he was warned off by one F. B. Gurley, who had him prosecuted for trespass after warning, and that he, Lee, did not again go on said land; that on Monday, after his trial and ³⁶³ acquittal on Saturday, he went to see the defendant at the latter's home; that he told defendant he owned the land and wanted to rent it to him, and the defendant said he had already rented the same from Captain F. B. Gurley for that year, but that he would also like to rent it from Lee; that witness told him he would rent him the land for one-third of the corn raised, and wanted the defendant to execute his note for said rent; that defendant promised to come by witness' home on a certain day and execute the note, but failed to do so; that Lee went to see defendant and found him on the land, plowing, and defendant refused to give him the note. It appears from Lee's testimony that after having been warned off the land by Gurley he did not again go on the same until after he had reconveyed the said land to plaintiffs, if his words are to be taken literally, viz., that after said warning he "did not go on said land afterward," and again, "did not go on said land any more." If the testimony of Lee as contained in the record be correct, then his evidence shows that during the whole period involving the making of the lease alleged, he himself was not in possession of said land, having gone out of possession under a warning by Gurley and not having returned; and his testimony also creates the inference that defendant was already in possession as the tenant of said Gurley. If Lee's evidence can be taken as establishing defendant's acknowledgment of Lee as his landlord, it shows that Lee did not place the defendant in possession of said lands; and, therefore, under the principles above laid down, upon the trial in 1897, the defendant was not estopped from disputing the title of said Lee, or from showing that he attorned to said Lee, or acknowledged him as his landlord, through fraud, misrepresentation, mistake, or ignorance of the true state of the title. We hold, therefore, that the trial court erred in excluding the evidence of F. B. Gurley, offered by the defendant, to the effect that he had owned and occupied the land in question since 1869, at which time he went into possession under a

"contract" with Baylor R. Stewart, and had been in continuous possession ever since; and that the court also erred in excluding the written contract referred to by said Gurley, which was in the nature of a ³⁶⁴ conveyance of said land by said Stewart to Gurley, dated December 9, 1869, and was admissible as color of title under which said Gurley held adversely.

As to the contract of renting, the testimony of William Lee, the only witness for plaintiff, upon this point has already been reviewed. The defendant Blankenship testified that he did not rent the lands in question from the plaintiffs or William Lee; that he told Lee when first approached by him that he had already rented the land from Captain Gurley for that year, but that if the land really belonged to Lee he would rent it from him on the same terms; that Lee wanted a "stub writing," to show that defendant occupied the land as his tenant; and that defendant told Lee he would see Captain Gurley, and if it was "agreeable to all parties" he would give him the writing; that Captain Gurley told him not to give Lee the writing, but to continue to occupy the land as he had been doing, and that when Lee came for the writing he refused to give such writing to Lee, and told him what Gurley had said. F. B. Gurley corroborated the evidence of Blankenship, and further testified that he had rented the land to Blankenship in the early part of the year 1895 for one-third of the corn, had put said defendant in possession of the land, and that the defendant had paid him the full rent as stipulated. This was substantially all the evidence upon this question disclosed by the record.

Upon the whole evidence we think the court below erred in rendering a judgment for the plaintiffs, and should have rendered judgment for the defendant. The judgment of the trial court must be reversed, and a judgment will be here rendered in favor of the defendant.

MATTERS IN ABATEMENT must be pleaded in proper time. They come too late after the trial begins: *Welchel v. Thompson*, 39 Ga. 559, 99 Am. Dec. 470; or after judgment: *May v. State Bank*, 2 Rob. (Va.) 56, 40 Am. Dec. 728.

PLEADING—AMENDMENTS PROPERLY ALLOWABLE.—An amendment may be permitted, in the discretion of the court, so long as it does not destroy the identity of the cause of action. A complaint may be amended by substituting parties different from those in whose names the suit was originally brought, if such amendment does not substantially change the claim or defense: See the monographic note to *Flanders v. Cobb*, 51 Am. St. Rep. 417.

427, showing what amendments to pleadings are not admissible because they change the cause of action.

PLEADING.—THE GENERAL ISSUE puts the plaintiff on proof of every material averment of his complaint: *Swift v. Tatner*, 89 Ga. 660, 32 Am. St. Rep. 101, 15 S. E. 842.

LANDLORD AND TENANT—DISPUTING TITLE—ESTOPPEL—FRAUD.—As a general rule, a tenant in possession cannot dispute the title of his landlord: *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; *Williams v. Wait*, 2 S. Dak. 210, 39 Am. St. Rep. 768, 49 N. W. 209; *Jackson v. Miller*, 6 Wend. 228, 21 Am. Dec. 316; *Rogers v. Waller*, 4 Hayw. (Tenn.) 205, 9 Am. Dec. 758. A tenant must surrender possession to the landlord before he can assert an outstanding title or one purchased by him: *Blake v. Howe*, 1 Aiken, 306, 15 Am. Dec. 681; and see *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258; *Emerick v. Tavener*, 9 Gratt. 220, 58 Am. Dec. 217. It is the contract of tenancy, followed by possession, that creates the estoppel to deny title; possession without the contract will not: *Shew v. Call*, 119 N. C. 450, 56 Am. St. Rep. 678, 26 S. E. 83. Such estoppel does not exist after the term has expired: *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265. The acceptance of a lease induced by fraud, mistake, misapprehension as to the state of the title, or by duress or other improper means used by the lessor, works no estoppel: See the monographic note to *Camp v. Camp*, 18 Am. Dec. 69, discussing the acceptance of a lease by one in possession; and compare *Williams v. Wait*, 2 S. Dak. 210, 39 Am. St. Rep. 768, 49 N. W. 209; *Givens v. Mullinax*, 4 Rich. 590, 55 Am. Dec. 706.

HENRY v. McNAMARA.

[124 Ala. 412, 26 South. 907.]

GARNISHMENT.—THE IMMATURE CLAIMS of indebtedness accruing to a defendant, which may be subjected to garnishment, are those which spring from contracts in existence when the lien of the garnishment process attaches.

GARNISHMENT.—A CONTRACT OF EMPLOYMENT which, by its terms, makes its continuance at all times dependent upon the will of either party, is no evidence of a future indebtedness subject to garnishment.

GARNISHMENT—PAYMENT IN ADVANCE FOR SERVICES—OVERDRAWING.—If an employer is garnished for an indebtedness due his employé, and his answer of no indebtedness is contested, but it appears that he allowed his employé to overdraw his wages by way of payment in advance for his services, the garnishee is entitled to avail himself of such overdrafts to extinguish, pro tanto, his liability to the employé without pleading or claiming them as a setoff.

GARNISHMENT—DEBTS ACCRUING BETWEEN TWO ANSWERS.—If a garnishee makes one answer in a justice's court, and another on appeal in the circuit court, his second answer, denying a present indebtedness does not raise an issue as to debts accruing between the filing of the two answers and not owing at the time of the last.

GARNISHMENT—INSTRUCTIONS.—When a garnishee, on appeal from a justice's court, files a second answer, denying a present indebtedness, it is not error, upon a contest of the answer, to refuse charges which ignore the principle that such answer does not raise an issue as to debts accruing between the two answers, and not owing at the time of the last, and which do not confine their propositions relating to the effect of payments to such payments as were made on indebtedness covered by the garnishment. Such charges would be misleading.

Henry sued one Kaune in a justice's court, and garnished McNamara. The garnishee's answer was contested and judgment went against him. He appealed to the circuit court and there made an answer of no indebtedness, which answer was also contested, but the issue was found in his favor. The defendant had been employed by McNamara as a bartender from day to day, at the rate of forty dollars per month. There was no employment for any specified time. The defendant Kaune was paid every day, and was frequently paid in advance. In fact, he had charge of the cash drawer and was at liberty to take money therefrom upon leaving a due bill therein for the amount. The first charge refused to the plaintiff was that: "Even if Kaune owed McNamara at any time covered by this garnishment, yet that would not of itself prevent McNamara from becoming indebted also to Kaune, and in this cause there has been no setoff claimed by McNamara, and none can be allowed him." The second, third, and fourth charges refused to the plaintiff ignored the principle stated in the opinion. The plaintiff appealed.

D. B. Cobbs, for the appellant.

T. M. Stevens, for the appellee.

414 SHARPE, J. The immature claims of indebtedness accruing to a defendant which may be subjected to garnishment are those which spring from contracts in existence when the lien of the garnishment process attaches: Code, sec. 2175. An indebtedness contingent upon the making of a new contract, or the renewal of an existing one, is not within the terms or meaning of the statute. To create the liability the contract must be such as that the duty of payment is already fixed, or is fixed to result from its performance. A contract of employment which by its terms makes its continuance at all times dependent upon the will of either party, hinges the contingency of indebtedness upon the volition of the parties rather than

upon the contract or its performance. The court correctly charged in substance that such a contract does not evidence a future indebtedness subject to garnishment: *Archer v. People's Sav. Bank*, 88 Ala. 249, 7 South. 53; *Alexander v. Pollock*, 72 Ala. 139.

Of the charges requested by the plaintiff the first is incorrect. The sums overdrawn by defendant from garnishee's funds appear from their manner of dealing to have been allowed by way of payment in advance for defendant's services. As payments they were available to extinguish pro tanto the garnishee's liability without being pleaded or claimed as a setoff.

Upon the former appeal in this case it was decided that the garnishment did not reach any indebtedness accruing after answer made; that on appeal from the justice court the garnishee was not bound to answer as to debts accruing after the answer in the justice court. It was also held that though a new answer denying present indebtedness would afford the plaintiff an opportunity to make an issue as to whether an indebtedness existed at that time, yet such a denial did not warrant an issue as to debts accruing between the two answers and not owing at the time of the last: *Henry v. McNamara*, 114 Ala. 107, 22 South. 428. The answer was made in the justice court on March 1, 1895. The effect of the former ruling is to exclude from the reach of this garnishment debts accruing on account of defendant's services after that date unless they remained unpaid at the time the answer was filed in the circuit court, and the fact of indebtedness ⁴¹⁵ at the latter date was only made material by reason of its having been included in the issues tried.

Charges Nos. 2, 3, and 4 are each misleading in ignoring the last stated principle, and in not confining their propositions relating to the effect of payments to such payments as were made on indebtedness covered by the garnishment.

Let the judgment be affirmed.

GARNISHMENT—DEMANDS SUBJECT TO.—In Alabama, garnishment lies to subject only those demands for which the judgment debtor could maintain debt or indebitatus assumpsit: Note to *Lathrop v. Olapp*, 100 Am. Dec. 510. To render a person liable as garnishee, he must have in his possession, belonging to the defendant, property, money, credits, or effects, or he must be indebted to the defendant: Note to *McLean v. Sworts*, 65 Am. St. Rep. 559. That a debtor cannot place his earnings beyond the reach of attachment and at the same time receive a portion thereof for his own use, see *Robinson v. McKenna*, 21 R. I. 117, 79 Am. St. Rep. 793, 42 Atl. 510.

ATTACHMENT PROCESS OPERATES ONLY UPON SUCH INTERESTS of the debtor as exist at the time it is served, and not on such as may afterward arise: Note to *Wattles v. Wayne* Circuit Judge, 72 Am. St. Rep. 593. If there is no indebtedness at the time of service from the garnishee to the defendant in attachment, the plaintiff will not be entitled to judgment, although it may appear that between the time of service and answer, the garnishee became indebted and paid the debt to the defendant in attachment: Note to *McLean v. Sworts*, 65 Am. St. Rep. 559.

BATES v. HARTE.

[124 Ala. 427, 26 South. 898.]

MECHANIC'S LIEN—SCOPE OF TERM "IMPROVEMENT"—HOW DETERMINED.—A statute giving a lien to one doing work upon or furnishing materials for "any building or improvement upon land" recognizes that improvements meriting the protection of a lien may be made upon land otherwise than by buildings, but, as they may occur in unforeseen variety, the scope of the term "improvement" is left for determination in particular cases as they may arise.

MECHANIC'S LIEN—IMPROVEMENTS.—A WELL designed and made for a permanent supply of water is an improvement upon land within the meaning of a statute which gives a lien to one doing work upon or furnishing materials for any improvement upon land.

CONTRACTS—SIGNING BY MARK—LACK OF ATTESTATION—EFFECT OF.—An instrument signed by a mark only is valid, except where the statute requires a mark and the name of an attesting witness. Hence, a contract, not required to be so signed, but which is signed by a mark without attestation, is admissible in evidence.

EVIDENCE—CONTRACT SIGNED IN PARTS—ADMISSIBILITY.—If a contract is in two parts, each party having signed only the part containing his promises, both parts are admissible in evidence and the defendant cannot complain where his own ill-founded objection results in the admission of one part to the exclusion of the other.

CONTRACTS—SIGNING—IGNORANCE OF CONTENTS—CARE REQUIRED.—One who has signed a contract in negligent ignorance of its contents cannot, in the absence of fraud or misrepresentation, set up such ignorance in avoidance of the obligation. If he could not read, due care for his own interest required that he should have the contract read to him.

CONTRACTS—SIGNING OF, PROCURED BY FRAUD—VALIDITY.—If a party about to sign an instrument has no knowledge of its contents, and is induced by misrepresentations of the opposite party to sign it, the fraud involved in such misrepresentations furnishes a defense to an action based upon the purported undertaking.

CONTRACTS—FAILURE OF ONE PARTY TO PERFORM—RECOVERY.—A party who fails to perform his part of a contract

cannot recover thereon where the other party is not at fault in the matter.

INSTRUCTIONS—CONFLICT OF EVIDENCE.—A charge which assumes a fact as proved, where the evidence is conflicting, is bad.

Action on a contract to bore a well, and to enforce a mechanic's lien for the amount found to be due thereon. There was a written contract signed by the parties in two parts, the stipulations on the part of the plaintiff Harte constituting one part, and those on the part of the defendant Bates the other part. Each party signed only the part containing his promises. The defendant contended that the written instrument was not the contract as made between the parties. He also demurred to the complaint on the ground that the boring of the well was not an improvement for which the statute gives a lien. The first three assignments of error were based on a judgment overruling the demurrer, and on the admission in evidence of the recorded contract claiming a lien. The second, third, and sixth charges refused for the defendant were to the effect that the plaintiff could not recover if it was found that he failed to comply with his agreement, without fault on the part of the defendant. The first, fourth, fifth, and seventh charges were all to the effect that if Harte quit boring the well before he obtained a sufficient supply of water, and moved his machinery away, he could not recover. The defendant appealed.

W. P. & W. L. Chitwood, for the appellant.

J. T. Kirk, for the appellee.

430 **SHARPE, J.** Under section 2723 of the code one doing work upon or furnishing materials for "any building or improvement upon land" is given a lien, to be perfected in the manner prescribed, upon the building or improvement and on the land on which the same is situated, to an extent limited by the same section.

The statute recognizes that improvements meriting the protection of a lien may be made upon land otherwise than by buildings, but as they may occur in unforeseen variety, the scope of the term "improvements" is left for determination in particular cases as they may arise. It is well known that a supply of water is often one of the most convenient and useful of all appurtenances to land. Its development by means of drilling and casing a well may greatly enhance the permanent

value of the land. We therefore hold that a well designed and made for a permanent supply of water is an improvement upon land within the meaning of the statute referred to: *Hoppes v. Baie*, 105 Iowa, 648, 75 N. W. 495.

This conclusion disposes of the first three assignments of error.

The lack of attestation to defendant's mark on the contract was not ground for excluding the writing or any part of it. Now, as at common law, such an instrument may be signed by mark only. The contract is not one which the statute requires to be signed, and, therefore, the statutory definition of signature as including mark when witnessed by a person writing his name as a witness does not apply: *Beckley v. Keenan*, 60 Ala. 293. Under the evidence both that part of the contract signed by the plaintiff and that part signed by the defendant were admissible. It was only because of defendant's ill-founded objection that both parts were not admitted, ⁴³¹ and he cannot complain if his own action resulted in the admission of one part to the exclusion of the other.

One who has signed a contract in negligent ignorance of its contents cannot, in the absence of fraud or misrepresentation, set up such ignorance in avoidance of the obligation. If he cannot read, due care for his own interest requires that he should have it read to him: *Jones v. Cincinnati etc. Ry. Co.*, 89 Ala. 376, 8 South. 61. If, however, his signature to the instrument without knowledge of its contents has been induced by misrepresentations concerning same made by the opposite party, the fraud involved in such misrepresentations will furnish a defense to an action based upon the purported undertaking: *Davis v. Snider*, 70 Ala. 315; *Foster v. Johnson*, 70 Ala. 249; *Cannon v. Lindsay*, 85 Ala. 198, 7 Am. St. Rep. 38, 3 South. 676. The defendant's evidence tended to show that before the writing was drawn there was a verbal contract materially different from that expressed by the writing. By the verbal agreement he sets up that the drilling was to be paid for at one dollar and fifty cents per foot in rock instead of two dollars as by the writing, and the drilling was to continue until a sufficient supply of water was obtained, as to which the writing was silent. It further tends to show that without any change of those terms the plaintiff handed the defendant the writing to sign, and without reading it told him it was the contract they had made for boring the well; whereupon, without

other information of its contents and without being able to read it, the defendant signed the writing by mark. From such representations, if made, the defendant might well have been misled into the belief that the writing was according to the previous agreement as stated by him. By the plaintiff's testimony the writing was really in accordance with the previous agreement, and he also says it was read; but this conflict in evidence presented a question of fact which should have been submitted to the jury under appropriate instructions. The giving of the affirmative charge for the plaintiff was, therefore, error.

It was open to the jury if they found the writing not binding as a contract upon the defendant to also accept the defendant's version of the contract. Under the agreement ⁴⁸² as he states it, the plaintiff could not rightfully have abandoned the well before reaching sufficient water unless for the defendant's fault, of which there is no evidence. Therefore, charges 2 and 3 and 6 requested by defendant should have been given.

The remaining charges requested by him were properly refused. By the contract, if it was as expressed in the writing and as the jury might have found it, the plaintiff did not stipulate to continue the work until the completion of the well or until sufficient water was obtained. Charges 1, 4, 5, and 7 each ignore that consideration. Charge 1 is also bad in assuming the well was not completed, there being conflicting evidence as to that fact.

Reversed and remanded.

MECHANIC'S LIEN—OIL-WELL.—A mechanic's or materialman's lien may be had and enforced against an oil-well for labor done and material furnished in drilling such well: *Haskell v. Gallagher*, 20 Ind. App. 224, 67 Am. St. Rep. 250, 50 N. E. 485.

CONTRACTS—SIGNING BY MARK.—A mark may be used in signing a paper: *Note to Brown v. Butchers' etc. Bank*, 41 Am. Dec. 755.

CONTRACTS—SIGNING IN IGNORANCE OF CONTENTS—MISREPRESENTATION.—If a party's signature to a written instrument, he being illiterate and unable to read or write, is procured by fraudulent representations or practices on the part of the other party, and the paper thus signed is materially different from that which he intended to sign and thought he was signing, such fraud will defeat an action at law on the instrument: See the monographic notes to *Spitze v. Baltimore etc. R. R. Co.* 32 Am. St. Rep. 386, on carelessness as a bar to relief; and *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 513, on ignorance of one's rights as a ground of relief. Compare *Gage v. Phillips*, 21 Nev. 150, 37 Am. St. Rep. 494, 26 Pac. 60.

CONTRACTS—FAILURE OF ONE PARTY TO PERFORM—RECOVERY.—A failure to comply with the terms of a special cove-

technical sense, but broadly, with liberality. The term 'party' used to indicate persons to whom the judge is related, and who are connected with the litigation, is not confined to parties of record": 12 Am. & Eng. Ency. of Law, p. 41, notes 3, 4, p. 42.

The supreme court of Texas, in the case of *Gains v. Barr*, 60 Tex. 676, construing a statute which contains substantially the same language as ours, said: "A narrow or contracted construction of the term 'party,' which confines it to the very person named on the docket as such, and excludes such as stand precisely in the same relation, would often defeat the end had in view of having justice impartially administered, free from the bias ⁴⁸² and influence produced by the interest held in the cause by the judge or his relations."

In *Foot v. Morgan*, 1 Hill, 654, where the language of the statute was: "No judge can sit who is of such affinity to either party that he might be challenged as a juror," the court said: "There can be no doubt that the statute extends to the party beneficially interested, as well as the real party."

In *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114, will be found an exhaustive dissertation in which a great many decisions are cited upon the subject of the disqualification of judges by reason of interest, relationship, or affinity, and bias or prejudice. Speaking directly to the point here under consideration the learned judge said: "Relationship or affinity to either party in interest, though not a party to the suit, is a cause of recusation by either."

The same construction has been placed upon our statute (Code, sec. 2637) by this court in *Gill v. State*, 61 Ala. 171, where it was said, after quoting section 540 of code in haec verba: "The parties to the present proceeding were the state of Alabama as complaining party, and Joe Gill as defendant. These were the only parties. It is manifest that the present case does not fall within the letter of the statute. But if we confine the rule to the strict letter of section 540 of the code, we thereby declare a judge may sit in judgment on a criminal who took the life of his nearest relative. Nay, more; for offenses less than homicide, we declare that a judge may try an offender for a public offense against his own person or property. According to the stern morality of the common law, a judge is required to be legally indifferent between the parties. Relationship, usually within the fourth degree of the civil law,

the law in its severe but humane ethics regards as a bias that unsettles the perfect equipoise that justice demands."

These authorities are conclusive that the disqualification extends not only to the party to the record, but that the judge is incompetent when related within the fourth degree to any person interested in the judgment or decree.

Is the interest of a surety upon an administrator's bond in a decree to be rendered on a final settlement of ⁴⁸⁸ his principal so remote and indirect as that notwithstanding the relationship of the judge he may render such decree?

The purpose of the settlement is to state the account between the administrator and those interested in the matter of distribution of the assets of the estate, whether they be heirs or creditors. An accurate statement of the account is a matter in which the administrator and the adverse parties are vitally interested. This, of necessity, involves the allowance of proper credits to the administrator for all money legally disbursed by him, and a charge against him of only such items as he is legally chargeable with. In the matter of the statement of this account it is of some moment to the sureties upon the administrator's bond that their principal should be charged only with such items as he is liable for, and that he be credited with all moneys rightly paid out by him, since the decree to be entered in the cause, by which they are bound, is predicated upon the account as stated by the judge. Indeed, we doubt not but that they can prosecute an appeal to this court for the purpose of reviewing the decree.

The principle here involved was expressly decided by this court in the case of *Wilson v. Wilson*, 36 Ala. 655. In that case the probate judge himself was a surety upon an administrator's bond. It could have been there said with as much plausibility as here that his interest was remote and contingent. But the court said: "Being, as we suppose, at one time bound as the surety of Randall and Roper, it follows that, unless he has been discharged as such surety, he is incompetent, from interest, to preside in any trial or controversy, the result of which will be to fix a liability on said administrators, or to discharge them from such liability. In such contest he has such an interest as not only disqualifies him from presiding, but would render any judgment pronounced by him void": See, also, *North Bloomfield etc. Min. Co. v. Keyser*, 58 Cal. 315.

The interest of the surety in the decree to be rendered is direct, and, of consequence, his relation to the probate judge

within the prohibited degree renders the judge incompetent to hear and determine the cause. When this ⁴⁸⁴ is the case, under section 3381 of the code it is the duty of such judge to certify the fact of incompetency to the register in chancery of the county, or if the register is incompetent, to the judge of the circuit or to the chancellor of the division; and such register, judge, or chancellor must, upon such certificate, appoint a disinterested person practicing in the county learned in the law to act as special judge. The record in this cause discloses that the appellant refused to certify his incompetency to the register in chancery of Calhoun county after being requested to do so. It does not appear that the register is incompetent, but his refusal to so certify as appears from the pleading was based solely upon the ground that he was not disqualified to hear the cause. Indeed, it was his duty without waiting until the parties objected to him, if he knew of the relationship, to refuse to hear the cause and to certify his disqualification to the proper officer: *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. By the terms of the statute the register, circuit judge, or chancellor are without authority to appoint a special judge except upon certificate of the fact of incompetency from the disqualified judge.

The next contention of appellant is that mandamus is not the proper remedy to require the judge to certify his incompetency to the proper officer to make the appointment of a special judge. The argument is that the judge must judicially determine his competency vel non, and that his decision of that question must be reviewed by appeal. The same argument was made in the case of *Ex parte State Bar Assn.*, 92 Ala. 113, 8 South. 768, as was the contention that an appeal was adequate. We will not repeat here what was so well and conclusively said by Justice McClellan in refutation of both of the contentions, and in holding that mandamus is the proper remedy. In that case the judge, perceiving that he was incompetent by reason of interest, declined to try the cause. Here the judge, conceiving that he is qualified, declined to certify his incompetency. There can be no difference in principle between the two cases. But the case of *State v. Castleberry*, 23 Ala. 85, is directly in point. The county judge was a surety upon the bond of the defendant, who was charged with ⁴⁸⁵ bastardy. The prosecutrix moved the court to transfer the cause to the circuit court upon the ground of the interest of the judge and consequent incompetency to try it. The judge decided that he had no interest which

incapacitated him to try the cause, and declined to make the order transferring it to the circuit court. Thereupon the prosecutrix applied to the circuit court for a mandamus to compel him to transfer the case, which was awarded. On appeal this court, after deciding that the county judge was incompetent to try the cause on account of interest, said: "We entertain no doubt but that mandamus was the proper remedy to compel the transfer of the cause."

In *Graham v. People*, 111 Ill. 253, it was held, where a county judge is interested in an estate of a deceased person, he has no discretion to exercise as to whether he will transfer the matter in dispute to the circuit court for adjudication, and his power is limited to the simple ministerial duty to cause the record and papers to be certified to that court in conformity with the statute, and mandamus lies to compel him to do so if he refuses. Said the court: "A final objection urged by counsel for respondent is, that mandamus does not lie in this kind of a case, and *People v. McRoberts*, 100 Ill. 458, is referred to in support of the position. The cases are essentially different. There the judge had to exercise judgment and discretion. The right to the change depended upon the sufficiency of the petition, and of this the judge was to determine. But here the interest of the judge is a matter knowledge of which exists in his own breast, and it renders him absolutely incompetent to act, goes to the jurisdiction of the court. There is nothing for him to exercise judgment upon. The fact existing, his power is limited to the simple ministerial duty of causing the record and papers to be certified in conformity with the statute."

We have not considered the other alleged ground of incompetency so ably argued by counsel on both sides, as a decision of that question is unnecessary under our view of the case.

The judgment of the court below must be affirmed.

THE SURETIES ON AN ADMINISTRATOR'S BOND are bound by a judgment against their principal: *Kenck v. Parchen*, 22 Mont. 519, 74 Am. St. Rep. 625, 57 Pac. 94.

JUDGES — DISQUALIFICATION — RELATIONSHIP.—In New Hampshire, a judge related to either party within the fourth degree is not qualified to sit in the case: *Fowler v. Brooks*, 64 N. H. 423, 10 Am. St. Rep. 425, 13 Atl. 417. See the monographic note to *State v. Wall*, 79 Am. St. Rep. 200-205, on who are related by affinity; and compare *State v. Call*, 41 Fla. 442, 79 Am. St. Rep. 189, 26 South. 1014. A judge who is satisfied that he is legally disqualified to act in a case ought not to wait until the parties object to him, but should refuse to hear the cause by an entry on the docket

that he does not sit in the case: *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

MANDAMUS—DISQUALIFICATION OF JUDGES.—Mandamus will issue to compel a judge to hear a cause if he has erroneously refused to hear it on the ground that he is disqualified or has not jurisdiction: *State v. Young*, 31 Fla. 594, 84 Am. St. Rep. 41, 12 South. 678. Mandamus may issue to compel judicial action: *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766.

JOHNSON v. WHITFIELD.

[124 Ala. 508, 27 South. 406.]

EXECUTION—WANT OF DIRECTION.—The fact that an execution, when issued by a justice of the peace, is not directed to any officer, does not render it void. Such defect is a matter of form, subject to amendment.

EXECUTION—TAKING ADVANTAGE OF DEFECTS IN.—The claimant, in an action to try the right of property levied on, cannot take advantage of a defect in an execution, which renders it voidable.

PLEADING—FATAL VARIANCE.—As the substance of an issue must be proved, any departure in the evidence from the substance constitutes a variance and is fatal.

DEFINITIONS.—A PATENT AMBIGUITY, or ambiguity apparent, is where the contract or conveyance, on its face, or aided by judicial construction, equally describes two or more persons or things.

EVIDENCE OF TITLE—MORTGAGE AS.—IN TRYING THE RIGHT OF PROPERTY levied on under execution, a mortgage relied on by the claimant is properly excluded as evidence of his title, where it contains a certain and definite description of property, but variant from the property claimed.

Action to try the right of property, commenced in a justice's court and appealed to a circuit court. Whitfield and Pinckard had caused an execution to issue on a judgment in their favor against one L. B. Britt, and it was levied on an ox, of which the defendant in execution had possession, but which was claimed by Johnson. The execution, when levied, was not directed to any officer, but was subsequently amended in the justice's court after Johnson had moved to quash the execution and levy. There was a judgment for the plaintiff and the claimant appealed.

James W. Strother, for the appellant.

Sorrell & Sorrell, for the respondent.

⁵¹⁰ HARALSON, J. 1. The fact that the execution issued by the justice of the peace, of date the 21st of July, 1897, was not, when issued, directed to any lawful officer of the county did not render it void. This was a matter of form, subject to amendment, as was done on motion before the justice. The execution introduced in evidence in the circuit court without objection was addressed "To any lawful officer": 1 Freeman on Executions, secs. 38, 64, 65. If this defect or irregularity rendered the execution voidable, the claimant could not take advantage of such defect or irregularity: Nordlinger v. Gordon, 72 Ala. 239; Sandlin v. Anderson, 82 Ala. 330, 3 South. 28; 2 Brickell's Digest, 480, sec. 71.

2. The return of the levy by the constable described the property levied on as "one black ox with white spot in face and white spot in left flank." The affidavit of claimant for the trial of the right of property and his claim bond described the property levied on and claimed as "one black and white pided butt headed ox named Brandy." The defendant in execution, examined by claimant, testified that he had but one ox, named Brandy, which was "black with a white spot on him, slightly red about the flanks, but was not what he would call a red ox; that he would call him a black ox, or black and white; that the red on him would not be noticed except on close inspection." The claimant, Johnson, testified that he knew the ox; that he would call him "a black ox, but he is not entirely black; he has a little red on him in his flanks, under his belly and a little on his sides, but he is more of a black than a red ox. I would not call him a red ox."

After this the claimant offered in evidence a mortgage by defendant to him, dated the 15th of February, 1897, and recorded in the probate office on the 23d of that month, which described an ox conveyed to claimant thereby as "one red spotted ox named Brandy." The plaintiff objected to the introduction of this mortgage on the ground that it did not describe the property claimed, which objection the court sustained, and this being all the evidence, the court charged in writing at request of plaintiff: "If the jury believe all the evidence, they will find the issue in favor of the plaintiff." The ⁵¹¹ exclusion of the mortgage as evidence and the giving of this charge constitute the remaining errors assigned.

3. It is a general rule that the substance of the issue must be proved, and any departure in the evidence from the substance constitutes a variance and is fatal. Another rule as

stated by Mr. Greenleaf is, "that whatever cannot be stricken out without getting rid of a fact essential to the cause of action, must be retained, and of course must be proved, even though it be described with unnecessary particularity": 1 Greenleaf on Evidence, sec. 63 et seq.

There is no ambiguity, latent or patent, in the description employed in the excluded mortgage. It is "one red spotted ox named Brandy." Nor is there generality or uncertainty about this description, which by proof aliunde could be shown that it applied to two or more oxen, including the one levied on, described in the affidavit and claim bond as "one black and white pided butt headed ox," or, as described by claimant in his testimony, as "a black ox, but not entirely black"; but the description is certain and definite, and, therefore, there is no latent ambiguity about it to be aided by outside proof. A patent ambiguity or ambiguity apparent is where the contract or conveyance on its face, or aided by judicial construction, equally describes two or more persons or things. It was not pretended that such was the case here. The mortgage being certain and definite of the ox described, and variant from the one claimed, was properly excluded as evidence of claimant's title: *Chambers v. Ringstaff*, 69 Ala. 140; *Meyer v. Mitchell*, 75 Ala. 475; *Varnum v. State*, 78 Ala. 28; *Chadwick v. Carson*, 78 Ala. 116; *O'Neal v. Seixas*, 85 Ala. 80, 4 South. 745; *Griffin v. Hall*, 115 Ala. 482, 484, 22 South. 162.

With the mortgage excluded, the claimant showed no title to the property, and the general charge was properly given for plaintiff.

Affirmed.

EXECUTIONS—AMENDMENT OF.—Errors in an execution, which are mere matters of form, may be amended: *Note to Woolford v. Dugan*, 35 Am. Dec. 53; but the writ cannot be amended as to matters of substance: *Blanks v. Rector*, 24 Ark. 496, 88 Am. Dec. 780. An execution can be amended only when it is merely voidable, and not when it is absolutely void: *McCormick v. Wheeler*, 86 Ill. 114, 85 Am. Dec. 388. The granting of amendments to executions rests in the sound discretion of the court: *Smith v. Bell*, 107 Ga. 800, 73 Am. St. Rep. 151, 33 S. E. 684.

EXECUTIONS—COLLATERAL ATTACK.—Erroneous or voidable executions cannot be collaterally attacked: *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404.

PLEADING—VARIANCE.—THE EVIDENCE must correspond with the allegations and be confined to the issues. If facts come out which would furnish ground for relief or defense, they must, if not warranted by allegations in the pleadings, be disregarded: *Note to Gossom v. Badgett*, 99 Am. Dec. 662.

ARNOLD v. ARNOLD.

[124 Ala. 550, 27 South. 465.]

APPEAL.—WAIVER.—ASSIGNMENTS OF ERROR which counsel do not insist upon in argument before an appellate court may be treated as waived.

ADMINISTRATOR'S DEBT TO INTESTATE—EXTINGUISHMENT OF.—When letters are granted to an administrator who owed his intestate at the time of the latter's death, the debt is thereby extinguished, and becomes money in his hands, for which he and his sureties are accountable, without reference to his solvency or insolvency.

EXECUTORS AND ADMINISTRATORS—PRESUMPTION OF PAYMENT OF NOTE.—When a debtor is the administrator of his creditor's estate, the doctrine of presumption of payment, in cases where a note is found in possession of the maker, free from circumstances calculated to excite suspicion, has no application.

EXECUTORS AND ADMINISTRATORS—POSSESSION OF NOTES OWING BY THEM TO INTESTATES—PRESUMPTION—BURDEN OF PROOF—ASSETS.—When an administrator has possession of notes executed by him to his intestate, the presumption is that they are assets of the estate and that he has money to pay them. He must, therefore, bear the burden of showing that they were not binding, subsisting, obligations upon him at the time of his intestate's death, and, consequently, were never assets in his hands.

Settlement by administrator.

J. E. Brown and Martin & Bouldin, for the appellant.

Tally & Proctor, for the appellee.

551 TYSON, J. On the sixth day of May, 1896, appellant was appointed administrator of the estate of his father, J. J. Arnold, Sr., who died on the second day of April just preceding. On July 17, 1896, an order was entered removing him as administrator, and revoking the letters granted to him on account of his failure to give a new bond in compliance with the former order of the court.

On the sixth day of February, 1897, the probate court appointed H. C. Arnold administrator de bonis non.

On July 17, 1897, the appellant filed his accounts for final settlement of his administration, and the 27th of August following was fixed as the day for the hearing of the same. This matter of settlement was continued from time to time until June 1, 1898.

On the eleventh day of November, 1897, the administrator de bonis non filed a written motion to charge the appellant with the sum of three thousand dollars, due by him to the intestate

in his lifetime as purchase money for a tract of land, evidenced by three promissory notes in the sum of one thousand dollars each, executed by him to his intestate, dated August 24, 1892, due, respectively, in twelve, twenty-four, and thirty-six months after date.

The probate court, in making up the account against the appellant, charged him with these notes and refused to allow him to set off certain items of indebtedness which he claimed against his intestate and also certain payments alleged to have been made by him. The action ⁵⁵² of the court in this respect is the only matter insisted upon in the brief of appellant's counsel, although there are quite a number of assignments of error based upon the rulings of the court in the admission and exclusion of testimony. We shall, therefore, consider only those matters insisted upon in argument and treat all other assignments of error as waived.

First, was there error in charging the appellant with three thousand dollars? It is not controverted by appellant's counsel, and indeed it cannot be, that if he owed the notes to the intestate at the date of his death when he was granted letters of administration the debt was extinguished. "Incapable of suing himself; divesting the contract of parties, an essential element to its origin and continuance; converting the debt, for all practical purposes, from a chose in action, into a chose in possession; by operation of law, the equivalent of a judgment and execution against himself, satisfaction of which it is his duty, legal and moral, to make; voluntarily taking upon himself the right and duty to demand and receive, and the existing obligation of paying and discharging resting upon him—it is the just, natural, logical, legal consequence of his voluntary act, that the debt he is in his fiduciary capacity bound to demand and receive and which he is under legal and moral obligation to pay and discharge should be presumed conclusively paid and discharged." It became money in his hands, without reference to his solvency or insolvency, which it was his duty to account for and with which he was chargeable: *Miller v. Irby*, 63 Ala. 482, and authorities cited.

The contention, however, is that as there is no evidence in the record to show that the notes were in the possession of the intestate after maturity, or that they went into the possession of the appellant after his intestate's death as assets of the estate, and as the evidence shows they were produced by the appellant upon demand by appellee, and introduced in evidence

after being taken from his possession against his objection, for the purpose of charging him with the money, the court committed an error in allowing the notes to be ⁵⁵³ introduced. The theory of this contention is based upon the doctrine of presumption of payment recognized and enforced by the courts in cases where a note is found in the possession of the maker, free from circumstances calculated to excite suspicion: *Lipscomb v. Delemos*, 68 Ala. 592; *Potts v. Coleman*, 86 Ala. 94, 5 South. 780; *Potts v. Coleman*, 67 Ala. 221. This doctrine has no application when the debtor is the administrator of his creditor's estate. It is made the duty of an administrator, immediately after taking out letters, to collect and take into his possession the goods and chattels, money, books, papers, and evidences of debt of the decedent, except the personal property specifically exempted from administration, and to make a full inventory of the same: Code, sec. 115. The administrator, by the very terms of the statute, is entitled to the possession of the note, notwithstanding it evidences a debt due and owing by him to his intestate. If his possession raised the presumption of payment by him to his intestate, it is clear the heir or any other person having the right of an accounting with him would be at a very serious disadvantage. Such a doctrine would require the heir in all cases to offer evidence that the note or obligation of the administrator to his intestate went into his hands as an asset of the estate, and that it was a subsisting liability against him at the date of the death of the intestate, in order to overcome the prima facie case made by evidence of mere possession by the administrator of the obligation, notwithstanding such possession was acquired by virtue of his appointment as administrator. We cannot lend our sanction to such a rule, the effect of which would be to offer a premium to debtors to administer upon the estate of their creditors in order to absolve themselves from the payment of an honest and just liability, to say nothing of the frauds that could be committed under it.

We are clearly of the opinion that the burden of proof was upon the administrator to establish that the notes were not binding, subsisting obligations upon him at the date of his father's death, and therefore were never assets in his hands. This he could do by showing that he had paid them to his father, or by making proof of ⁵⁵⁴ some other fact which absolved his liability upon them during the lifetime of his father. The production of the notes, though they came from his pos-

session, and their introduction in evidence, raised the presumption not only that they were assets of the estate, but that he had that amount of money in his hands for which he was accountable. In stating the account there was no error in charging the appellant with the amount of the notes, unless he sustained the burden of showing their payment to his intestate.

Upon this point the evidence is in conflict. That upon which the appellant relies in the main to sustain his contention as to payment and their surrender to him is the testimony of his wife. She did unqualifiedly testify to the possession of the notes by the defendant in December, 1894—nearly a year before the maturity of one of them. Her testimony shows her husband to be a small farmer, owning no property of which she was aware, except the three mules with which he made his crops. She did not know of his having any money with which to pay the notes. In rebuttal of this was testimony of an admission made by him that the notes had not been paid. Besides, the only means out of which he could have paid these notes, as shown by the testimony of the witnesses introduced by him to establish a payment or a setoff to this debt, arose out of the business of two firms, Arnold & Anderson and Arnold, Anderson & Stuart, of which he was a member. It is very clear from the testimony that neither of these firms for him ever paid to his intestate prior to December, 1894, a sufficient sum to liquidate his liability upon those notes.

Outside of the note for thirteen hundred and sixty-eight dollars and eighty-nine cents of Croker, Arnold & Gamble, a firm of which his intestate was a member, dated August 3, 1892, which the court allowed as a setoff, the only other sum shown to have been paid to the intestate was six hundred and twenty-five dollars by the firm of Arnold, Anderson & Stuart, on account of cedar and lumber. It is true the record contains the statement of an itemized account amounting to sixteen hundred and sixteen dollars and seventy-four cents, which the appellant claims is due him, but there is no proof of its correctness. An ⁵⁵⁵ examination of the dates of the items on this account show that only about seven hundred and twenty-five dollars was claimed to have been paid prior to December, 1894. Besides, if it had been true that the notes were paid in December, 1894, in the manner claimed, it is highly probable and certainly in keeping with common business methods that J. J. Arnold, Sr., would have required the note for thirteen hundred

and sixty-eight dollars and eighty-nine cents to have been surrendered to him and taken an acquittance in writing for all other items of indebtedness claimed of him before surrendering the notes.

Leaving out of consideration the itemized account which was not proven, we find the facts, so far as payments or setoffs claimed, to be these: During the years 1893 and 1894 the firms of Arnold & Anderson and Arnold, Anderson & Stuart cut certain timber off the lands sold by J. J. Arnold, Sr., to the appellant, and prepared it for market at a mill owned by Arnold, Sr., and one Gamble. Just how much timber was cut by the intestate off these lands and its value we are not informed. The evidence does disclose, however, approximately the quantity of timber cut by the two firms. However, the only two witnesses competent to testify to transactions with the intestate and who had any accurate knowledge of the quantity of the timber, its value, and the disposition of the proceeds arising from the sale of it, were Stuart and Anderson. Stuart says that the square cedar was sold for seven hundred and eighteen dollars to Eagle Pencil Company and Arnold, Sr., got one-half the money which was paid as stumpage. And yet he says the draft for this sum was deposited in the Bank of Winchester, Tennessee, to the credit of Arnold & Anderson. How Arnold, Sr., got half the money out of the bank or when is not shown by the testimony.

Anderson, a member of the firms of Arnold & Anderson, and of Arnold, Anderson & Stuart, testified that the firm was indebted to J. J. Arnold, Sr., during the years 1893 and 1894, but could not state amount or dates of such indebtedness. That the indebtedness was for services rendered by him for the firm and stumpage. He states that the contract for services was this: "He [J. J. Arnold, Sr.] would work for us and he would pay himself. Being a father, we were perfectly willing ⁵⁵⁶ to let him transact any of our business. We used the mill by his instruction." It appears from the other evidence that Arnold, Sr., assisted in the management of the business of the firm, sold lumber for it, etc., and that the firm was to pay rent for the mill. Manifestly the intention of the parties was that J. J. Arnold, Sr., was to apply any money of the firm received by him in payment of his services. What the value of his service was is not shown, and while the rent of a sawmill is shown to be worth sixty or seventy cents per thousand for sawing lumber, we are not informed by the evidence with any degree of

accuracy how many thousand feet of lumber were sawn at this mill by these firms. This witness further states that he does not know how the accounts between the firms and J. J. Arnold, Sr., stood. He did say, however, that the firm of Arnold, Anderson & Stuart got about twelve hundred and fifty dollars worth of cedar off the land, "of which we gave J. J. Arnold, Sr., one-half for stumpage," and on cross-examination, speaking of this payment, he said: "We paid him the first stumpage, part in money and a part in draft on the Eagle Pencil Company. The balance was all in checks on the Bank of Winchester, but some of them were made payable to different persons for J. J. Arnold, Sr."

Without commenting upon the conflict in the testimony of these two witnesses as to what amount was paid and how paid to Arnold, Sr., it is not satisfactorily shown that Arnold, Sr., did not have the right to apply and did apply all or a portion of the moneys received by him to the payment of his services and the rent of the mill. If so applied, certainly the appellant is not entitled to have it credited upon his indebtedness. If only a portion was so applied, we are not informed and have no means of ascertaining, the balance that should be credited as a payment or allowed as a setoff.

The evidence is too indefinite, and not sufficiently clear to support the onus upon appellant of establishing reasonably that he is entitled to have any certain sum allowed either as a payment or setoff.

The decree must be affirmed.

AN ASSIGNMENT OF ERROR NOT ARGUED is waived: *Ward v. Hood*, 124 Ala. 570, post, p. 205, 27 South. 245.

EXECUTORS AND ADMINISTRATORS—PERSONAL DEBT TO DECEDENT.—Except as against creditors, an executor's indebtedness to the testator was, by the common law, released or extinguished: *Judge of Probate v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619, 44 Atl. 720. An administrator is to be charged with a personal debt due from him to the decedent as money on hand: *Estate of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991. A debt due from a person to a testator or intestate becomes, by the debtor's appointment as executor or administrator, assets in his hands: *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285, 38 Atl. 535.

WARD v. HOOD.

[124 Ala. 570, 27 South. 245.]

REPLEVIN—BOND WITH VOID CONDITION.—If property is attached, and replevied, but judgment is rendered in the attachment suit and the property condemned before a replevy bond is executed, which fact is unknown to the sheriff and obligors in the bond when it is executed and the property is delivered by the sheriff to the obligors therein, this does not render the bond void. Upon its execution a present debt immediately arose from the obligors to the obligees therein, and the fact that its condition is incapable of performance does not destroy the obligation or indebtedness thereby created, but only renders the condition void; and the plaintiff's right of action on the bond arose immediately upon the execution thereof.

REPLEVIN—SUIT ON BOND.—THE PROPER MEASURE OF DAMAGES in a suit on a replevy bond is the value of the property with interest thereon.

ASSUMPSIT.—AN ACTION FOR MONEY HAD AND RECEIVED lies wherever one has received or holds money which *ex aequo et bono* belongs to another.

JOINT LIABILITY—TORT FEASORS—ACTION FOR MONEY HAD AND RECEIVED.—If one person wrongfully converts the property of another, the tort may be waived and an action for money had and received for the use and benefit of the plaintiff be sustained for the proceeds of the conversion; but where there are two or more joint tortfeasors, and the tort is waived, such an action cannot be sustained as to the tortfeasor who did not receive any benefit from the conversion.

APPEAL—WAIVER.—ASSIGNMENTS OF ERROR which counsel do not insist upon in argument before an appellate court may be treated as waived.

APPEAL—ASSIGNMENTS OF ERROR—WHEN NOT INSISTED UPON.—A mere repetition of an assignment of error, in the brief of counsel, will not be considered by an appellate court as an "insistence in argument."

Action on a replevy bond, brought by Hood against Ward and others. The charge refused to the defendant was, that, if the jury believed the evidence, the plaintiff was not entitled to recover for money had for the use of the plaintiff.

B. B. Smyer, for the appellants.

Matthews & Whitesides and John L. Burnett, for the appellee.

571 DOWDELL, J. The replevy bond sued on in this case was executed by the appellant, Charles P. Ward, as a surety, with Simpson, Glover & Hight as principal obligors in the bond. The bond contained the usual conditions of a statutory replevy bond to have the property replevied forthcoming to satisfy the judgment rendered. The five bales of cotton, the

property replevied, had been levied upon under two attachments sued out in the justice court by the appellee, S. M. Hood, against one J. B. Davis, to enforce the landlord's lien for rent. At the date of the execution of the replevy bond judgment had been rendered in the attachment suits in the justice court, and a judgment of condemnation for the five bales of cotton. This fact, however, was unknown to the sheriff and the obligors in the bond when the replevy bond was executed and the cotton delivered by the sheriff to the obligors. It is now contended by appellant's counsel that the condition subsequent in the bond, upon the happening of which the bond is to be void, being impossible of performance at the date of the execution of said bond, renders the bond void.

This contention, we think, is unsupported by sound reasoning and opposed to the plainest principles of common justice. Upon the delivery of the cotton to the obligors and the execution of the bond there was created thereby a "*debitum in praesenti solvendum in futuro*," upon a contingency; but, as the contingency had already happened, and therefore could not happen again, ⁵⁷² unless the defendant, or some one for him, should take an appeal, which was not done, the facts present either the aspect of a bond with a condition impossible of performance at the time of its execution, or one the condition of which was rendered incapable of performance, and not by any act of the obligee. Neither aspect would exonerate the defendant from liability on the bond.

In *Gannard v. Eslava*, 20 Ala. 742, it was said: "There is a present debt existing at law immediately upon execution of the bond, the condition being a condition subsequent only, and operating merely upon the remedy without in any manner changing, diminishing, or qualifying the debt itself."

In the present case the delivery of the possession of the cotton by the sheriff to the obligors in the bond formed the consideration of the bond and the debt was thereby immediately created. The fact that the condition in the bond—an event upon the happening of which the bond would become void—was one incapable of performance at the date of the execution of the bond does not destroy the obligation or indebtedness created by the bond, but only renders the condition void: *Hudges v. Edwards*, 9 Wheat. 489; 2 Am. & Eng. Ency. of Law, 1st ed., 463, and authorities there cited: *Coke's Littleton*, 206a; *Sanders v. Coward*, 15 Mees. & W. 48; *De Vergier v. Fellows*, 5 Bing. 265; *Adler v. Potter*, 57 Ala. 571. "A condition may

be impossible or repugnant, or it may be so expressed as to be void for uncertainty or insensibility. And when the true meaning cannot be ascertained, or when ascertained the condition cannot be enforced, the obligation will nevertheless be binding at common law, and herein lies an important distinction between conditions void for illegality and conditions void because merely defective": 4 Am. & Eng. Ency. of Law, 2d ed., 663, and authorities there cited, 686, note 1; *Da Costa v. Davis*, 1 Bos. & P. 242.

As the event named in the condition of the bond—i. e., judgment in favor of the plaintiff in the attachment suit for the satisfaction of which the cotton was to be ⁵⁷³ delivered up by the obligors—had already taken place, the plaintiff's right of action on the bond arose immediately upon the execution of the same. The bond being a guaranty for the delivery of the cotton for the satisfaction of the judgment in attachment, the proper measure of damages in a suit upon the bond would be the value of the cotton with interest thereon.

The present suit was originally brought against Charles P. Ward and Simpson, Glover & Hight, but was discontinued on motion of the plaintiff as to the last three named, no service having been had upon either of them. The complaint contained a count for money had and received. The evidence shows without conflict that Charles P. Ward, against whom the action is alone prosecuted, was the surety of Simpson, Glover & Hight on the replevy bond, and that the cotton in question was shipped to Rome, Georgia, and there sold by the said Simpson, Glover & Hight. There is no evidence showing that the proceeds, or any part of the proceeds of the sale of said cotton, ever came into the hands of Charles P. Ward. The action for money had and received is equitable in its nature, and is based upon the theory that one person shall not unjustly be enriched at the expense of another. It properly lies wherever one has received or holds money which *ex aequo et bono* belongs to another. Where one wrongfully converts the property of another, the tort may be waived and an action be brought for the proceeds arising from such conversion as for money had and received for the use and benefit of the plaintiff. But where there are two or more joint tort feors, and the tort be waived, the action for money had and received for the use and benefit of the plaintiff cannot be sustained as to the tort feor who did not receive any benefit arising from the conversion. In waiving the tort and suing in this action there is a rat-

ification of the contract of sale which constituted the conversion, and the suit can only be maintained against him or those who received the proceeds of such sale or received the benefits of the same. As there is no evidence that the defendant, Charles P. Ward, ever received any of the proceeds arising from the sale of said cotton, or was in any wise benefited thereby, the court erred in refusing the fourth written charge requested by the defendant.

574 There are several other assignments of error, but as they are not insisted upon in argument by appellant, they will be considered as having been waived. The mere statement in brief of counsel that "the court erred in overruling defendant's demurrer to the complaint," or in "sustaining plaintiff's demurrer to defendant's plea," which is but a repetition of the assignments of error, will not be considered by this court as an insistence in argument.

For the error pointed out in the refusal to give defendant's written charge No. 4, the judgment of the court is reversed and the cause remanded.

BONDS.—A CONDITION is not a necessary part of a money bond; the instrument may be complete and binding without it. A senseless or void condition does not render the bond void or inoperative: *Giles v. Halsted*, 24 N. J. L. 866, 61 Am. Dec. 668.

REPLEVIN.—THE MEASURE OF DAMAGES in replevin is the value of the property at the time it was replevied, with interest to the time of the trial: *Berthold v. Fox*, 18 Minn. 501, 97 Am. Dec. 243; *Herdic v. Young*, 55 Pa. St. 176, 93 Am. Dec. 739. But in an action on a replevin bond the defendant should recover no more than his legal damages, which depend upon the nature of his right to the property, or the character in which he held it: *Pearl v. Garlock*, 61 Mich. 419, 1 Am. St. Rep. 603, 28 N. W. 155. Compare *Williams v. Vail*, 9 Mich. 162, 80 Am. Dec. 76. A judgment in an action against the sureties on a replevin bond cannot be given for more than the penalty and costs. Interest is not recoverable: *Fraser v. Little*, 13 Mich. 195, 87 Am. Dec. 741.

ASSUMPSIT.—AN ACTION FOR MONEY HAD AND RECEIVED can be maintained whenever one man has received, or obtained possession of, the money of another, which he ought, in equity and good conscience, to pay over: *Finch v. Park*, 12 S. Dak. 63, 76 Am. St. Rep. 588, 80 N. W. 155.

JOINT LIABILITY—TORT FEASORS.—One of several wrongdoers is liable to the full amount of a conversion or misappropriation in which he has participated: *Russell v. McCall*, 141 N. Y. 437, 88 Am. St. Rep. 807, 36 N. E. 498.

AN ASSIGNMENT OF ERROR NOT ARGUED is waived: *Arnold v. Arnold*, 124 Ala. 550, ante, p. 199, 27 South. 465.

BOLIN v. SANDLIN.

[124 Ala. 578, 27 South. 464.]

JUSTICE OF THE PEACE—JUDGMENT OF, WHEN NOT VOID.—A judgment by a justice of the peace, in an action to recover a mare, giving “judgment against the defendant and in favor of the plaintiff for forty dollars, or the mare in good condition,” is not void on its face. Technical accuracy before such officers is not required.

JUSTICE OF THE PEACE—JURISDICTION—CERTIORARI.—When the jurisdiction of a justice of the peace is assailed on certiorari to annul his judgment, his want of jurisdiction must appear on the face of the proceedings filed by him in the circuit court in response to the writ, else it will be of no avail. The allegations of the petition for the certiorari cannot be considered on the question of jurisdiction.

Common-law certiorari by Bolin to annul a justice’s judgment against him in favor of Sandlin.

Nesmith & Nesmith, for the appellant.

W. A. Young, for the appellee.

579 HARALSON, J. 1. This case originated before a justice of the peace, in which the appellee, the plaintiff, sued the appellant, the defendant below, to recover in detinue a gray mare. The defendant replevied the animal. On the trial the justice rendered a judgment in favor of the plaintiff, in these words: “November 26, 1898. After hearing all the evidence and statement in the above cause, the court gives judgment against the defendant and in favor of the plaintiff for forty dollars, or the mare in good condition.” This judgment is informal and not as perfectly rendered as, presumably, it would have been rendered by a circuit court. Technical accuracy in proceedings before a justice of the peace is not required, for the reason that they are not, generally, skilled in legal matters. Retaining no more than is fairly in the judgment, it may, by liberality of construction, be paraphrased to read: “The court gives judgment against the defendant for the mare, to be restored to the plaintiff in good condition, or, in default thereof, for forty dollars in favor of plaintiff.” The defendant had given a replevy bond for the forthcoming of the animal, or pay all costs and damages for the wrongful detention. The court below was not in error, therefore, in holding that the judgment was not void on its face. It perhaps contains enough for a correction nunc pro tunc, on proper proceedings for the purpose, if that were desirable.

⁵⁸⁰ 2. The objections raised to the want of jurisdiction in the justice who tried the case and rendered the judgment are of no avail. This lack of jurisdiction, if it existed, does not appear upon the face of the proceedings filed by the justice in the circuit court in response to the writ of certiorari. It could only be gathered, if at all, from the allegations of the petition, not competent to be considered for that purpose. The court was shut up, in rendering its judgment, to what appeared on the face of the proceedings: *Gray v. Southern Ry. Co.*, 116 Ala. 654, 22 South. 973; *Independent Press Co. v. American Press Assn.*, 102 Ala. 475, 492, 15 South. 947.

3. It appears from the proceedings that the defendant appeared before the justice on the day the case was set for trial, and it does not appear he interposed any objection to the jurisdiction of the justice. It may be, on this account, though we deem it unnecessary to decide the question, that he is thereby precluded from afterward raising that question in the circuit court. We refer to the cases of *Louisville etc. R. R. Co. v. Barker*, 96 Ala. 435, 11 South. 453; *Gray v. Southern Ry. Co.*, 116 Ala. 654, 22 South. 973.

The court below refused to quash the writ and affirmed the judgment of the justice of the peace, in which we find no error.

JUSTICE'S JUDGMENT—FORM OF.—A judgment of a justice's court is not expected to be in perfect form. Matters of form, in such a judgment, are to be overlooked: *Note to Torilla v. Alexander*, 78 Am. St. Rep. 931.

JUSTICE OF THE PEACE—JURISDICTION—PRESUMPTION. Every reasonable presumption should be indulged to uphold the jurisdiction and proceedings of a justice of the peace: *Fulton v. State*, 103 Wis. 238, 74 Am. St. Rep. 854, 79 S. W. 234.

CERTIORARI—JURISDICTION—JUSTICE OF THE PEACE.—The question of jurisdiction is the limit of inquiry upon certiorari: *Ahlers v. Thomas*, 24 Nev. 407, 77 Am. St. Rep. 820, 56 Pac. 93. On a common-law certiorari, the court can review proceedings of a justice of the peace only so far as they relate to jurisdictional questions shown by the pleadings and docket entries: *Fulton v. State*, 103 Wis. 238, 74 Am. St. Rep. 854, 79 N. W. 234. Compare the monographic note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 29-46, discussing questions reviewable upon certiorari.

JONES v. CHENAULT.

[124 Ala. 610, 27 South. 515.]

EVIDENCE—RES GESTAE—CONVERSATIONS—OWNERSHIP OF PROPERTY.—If goods in a husband's possession are levied on, and his wife interposes a claim to them in an action to try the right of property, conversations had between the claimant and her husband prior to the levy are a part of the *res gestae* relating to the fact of ownership of the goods, or of the husband's agency in purchasing and controlling them, and as such are admissible in evidence.

EXECUTION—TRIAL OF RIGHT OF PROPERTY—PROPER EVIDENCE.—In trying the right of property in goods levied upon as the property of a husband, but which are claimed by his wife, the question as to whether the money used in the purchase thereof belonged to him or her is a material inquiry, and it is proper for her to show the source whence the money came.

HUSBAND AND WIFE—AGREEMENT BETWEEN, AS TO INVESTMENT AND AGENCY.—If there is an understanding between a husband and his wife that she will invest her money in goods and that he will buy and sell the same for her as her agent, such an agreement and investment, whether known to the seller or not, is effective, as between the husband and his wife, to make the purchase her own and to vest in her the title to the goods.

HUSBAND AND WIFE—HER POWER TO CONTRACT WITH HIM AND TO ACQUIRE PROPERTY.—Under the statute of Alabama, a married woman may make valid and binding agreements with her husband, and she has full capacity to acquire property. Its acquisition by her from persons other than the husband, when the consideration does not move from him, can work no fraud upon his creditors, for nothing is thereby withdrawn from his estate as in the case of a transfer of his property.

DEFINITION—BONA FIDE PURCHASER.—A JUDGMENT CREDITOR does not, by the levy of an execution, put himself in the attitude of a bona fide purchaser.

APPEAL—FINDINGS OF FACT WILL BE ALLOWED TO STAND, WHEN.—If a jury has been waived, findings of fact dependent upon the credibility of oral testimony will, on appeal, be allowed to stand unless the evidence as a whole would justify the setting aside of a verdict.

Action against Mrs. A. F. Chenault to try the right of property. The evidence showed that, before the purchase, Mrs. Chenault said to her husband that she was going to invest her money in goods, and that her husband was to conduct the business for her; that the money used by the claimant in purchasing goods was from her father's estate; and that she gave to her husband a list of certain goods to be purchased. There was a judgment for the claimant, and the plaintiff appealed.

Knox, Bowie & Dixon, for the appellant.

Whitson & Graham, for the appellee.

612 SHARPE, J. The plaintiff having a judgment against S. M. Chenault obtained in 1896, levied an execution issued thereon upon a stock of goods found in Chenault's possession and which was purchased in 1898 by either him or his wife. Mrs. Chenault interposed a claim to the goods and the issue tried involved solely the question as to whether they belonged to her or to the defendant in execution.

None of the assignments of error based upon matters of evidence can be sustained. The conversations referred to in them, had between the claimant and her husband, were part of the *res gestae* relating to the fact of ownership of the goods in controversy or of the husband's agency in purchasing and controlling them, and as such were admissible in evidence. Whether the money used in the purchase belonged to the claimant or her husband was a material inquiry, and it was proper 613 for her to show the source from which the money came.

The record fails to show that any question was addressed to J. T. Elliott as mentioned in the eighth assignment of error.

According to the testimony of both the claimant and her husband, that part of the goods obtained from the Georgia Manufacturing Company, was bought by the claimant in person and paid for by her out of her funds.

As to the goods obtained from the Talladega Mercantile Company, the claimant and her husband both testify that they also were paid for by her and from her own funds. The husband testifies that there was an understanding between himself and the claimant in relation to the purchase and sale of the goods to effect that the claimant would invest her money in the goods and that he would conduct the business for her as her agent. Such an agreement and investment, whether known to the seller or not, was effective as between the claimant and her husband to make the purchase her own and to vest in her the title to the goods.

Under the statute a married woman may make valid and binding agreements with her husband and she has full capacity to acquire property. Its acquisition by her from persons other than the husband, when the consideration does not move from him, can work no fraud upon his creditors, for nothing is thereby withdrawn from his estate, as in the case of a transfer of his property. If the transaction was in fact according to the claimant's evidence, in the absence of an estoppel growing

out of her husband's apparent ownership, there is nothing to prevent the maintenance of her title.

By the levy of his execution the plaintiff parted with nothing of value. His attitude is not that of a bona fide purchaser and he acquired no more interest in the property than his debtor had.

The correctness of the judgment depends mainly upon the degree of credibility attaching to the evidence introduced by the claimant. That evidence upon the fact of ownership was practically undisputed and is shaken only by the facts relating to the situation of the parties ⁶¹⁴ and the manner in which the goods were dealt with. This court has ruled that where a jury is waived, findings of fact dependent upon the credibility of oral testimony will on appeal be allowed to stand, unless the evidence as a whole is such as would justify the setting aside of a verdict: *Siniard v. Green*, 123 Ala. 527, 26 South. 661. The application of the rule to this record requires that the judgment be affirmed.

EVIDENCE—RES GESTAE—CONVERSATIONS—OWNERSHIP OF PROPERTY.—Conversations closely connected with the facts in issue, explaining and characterizing them, are admissible in evidence as parts of the *res gestae*. Declarations of a person in possession of property as to the capacity in which he holds are so admissible: See the monographic note to *People v. Vernon*, 95 Am. Dec. 53, 70, on *res gestae*. Compare *Relley v. Haynes*, 38 Kan. 259, 5 Am. St. Rep. 737, 16 Pac. 440.

HUSBAND AND WIFE—AGENCY OF ONE FOR THE OTHER—INVESTMENT—CREDITORS.—A married woman may employ her husband as her agent: *Taylor v. Wands*, 55 N. J. Eq. 491, 62 Am. St. Rep. 818, 37 Atl. 315; and his acting as such will not be allowed to prejudice the wife's rights: *Wood v. Armour*, 88 Wis. 488, 43 Am. St. Rep. 918, 60 N. W. 791. The employment of a husband by his wife to cultivate her land is not of itself proof of an arrangement to defraud his creditors. Neither does a wife's money become the property of her husband when she places it in his hands to be invested for her: *Feller v. Alden*, 23 Wis. 301, 99 Am. Dec. 173.

HUSBAND AND WIFE—DEALINGS BETWEEN—CONTEST BETWEEN WIFE AND HER HUSBAND'S CREDITORS.—A wife may deal with her husband with respect to her separate estate as though the relationship of marriage did not exist, subject to the conditions prescribed by statute: Note to *Osborne v. Cooper*, 59 Am. St. Rep. 121; but see *Heacock v. Heacock*, 108 Iowa, 540, 75 Am. St. Rep. 273, 79 N. W. 353. In a contest between a wife and the creditors of her husband wherein she claims that property is her separate estate, and therefore not subject to a writ in favor of such creditor, she has the burden of showing by clear and satisfactory evidence that she paid for the property out of her separate estate: *Martin v. Remington*, 100 Wis. 540, 69 Am. St. Rep. 941, 76 N. W. 614.

SKEWES v. TENNESSEE COAL, IRON & RAILROAD CO.

[124 Ala. 629, 27 South. 435.]

GARNISHMENT reaches only such demands as the defendant debtor could, in his own name, recover in an action of debt or *indebitatus assumpsit*.

GARNISHMENT.—THE WAGES OF A CITY EMPLOYEE, engaged in administering the affairs of the municipality, are, on grounds of public policy, exempt from the process of garnishment.

ATTACHMENT—GARNISHMENT—WAGES OF SANITARY INSPECTOR—EXEMPTION OF.—When a person is employed by a city to do its sanitary work, and is to be paid for his services a stated per cent of the proceeds arising from such services, when collected by an officer to be appointed by the city for that purpose, he is an employé of the city, engaged in administering its affairs. Hence, if a company has collected from its employés certain sanitary charges, payable to such officer, the fund is not subject to garnishment in the company's hands at the suit of a creditor of such employé.

Contest of answer of garnishee. Skewes had recovered a judgment against the defendant debtor, W. H. Harney, and had sued out process of garnishment against the defendant company. The garnishee answered, no indebtedness, and the answer was contested. Harney had a contract for doing the entire sanitary work of the city of Bessemer. The garnishee had collected certain sanitary charges from its employés and had the money on hand when garnished. This was the money sought to be condemned as due to Harney. From a judgment in favor of the garnishee the plaintiff appealed.

James A. Estis, for the appellant.

James Trotter, for the appellee.

631 **DOWDELL, J.** It is evident from the facts in this case that the fund sought to be reached by the garnishment proceedings arose under a contract made by the municipal authorities of the city of Bessemer with W. H. Harney, the defendant debtor. The subject matter of this contract with Harney related to sanitary services to be performed by him for the benefit of the city of Bessemer. Sanitary regulations for the preservation of the health of the people are as vital and important to the good government and well-being of its citizenship in the administration of the affairs of the municipal corporation as the police of its streets and thoroughfares for the preservation of peace and order. The relation of Harney to the municipality of Bessemer was that of an employé, in the administration

of the affairs of the city, whose wages, on the grounds of public policy, would be exempt from the process of garnishment for the same reason that the wages of a police officer of a city would be exempt. The fact that Harney was to pay the municipality twenty-five dollars a month for the privilege of having the sanitary contract with the city did not change or vary his relations or duties under the contract to the municipality. The only fair and reasonable interpretation to be put upon the contract is that Harney was employed by the municipal authorities to do the sanitary work of the city, and for ⁶³² such services to receive as his compensation eighty-five per cent of the proceeds arising from such services when collected by an officer to be appointed for that purpose by the municipality, and, for the privilege of having the contract, he, Harney, to pay the city twenty-five dollars per month. Harney had no contract with the garnishee, nor with the employés of the garnishee from whom the fund in question was collected by the garnishee, for the sanitary labors and services performed by the said Harney, nor did Harney have any right to collect this money by the express terms of the contract; and it follows as a clear proposition that he could not have maintained *indebitatus assumpsit* against the garnishee.

On grounds of public policy, the fund in question could not be reached by process of garnishment by a creditor of Harney: *Murphree v. Mobile*, 108 Ala. 663, 18 South. 740; *Pruitt v. Armstrong*, 56 Ala. 306; *Mayor etc. of Mobile v. Roland*, 26 Ala. 498.

Under the terms of the contract, Harney could not maintain a suit in his own name against the garnishee. "Only such demands can be subjected by garnishment as the defendant in his own name could recover in an action of debt or *indebitatus assumpsit*": See 1 *Brickell's Digest*, sec. 314, p. 175, and authorities there cited.

The only difference between this case and the case of *Skewes v. Huey*, 122 Ala. 674, 26 South. 1034, decided at the last term of the court, is as to the person garnished. In both cases the fund sought to be reached arose under the same contract. In this case the fund is sought to be subjected while in the hands of the garnishee, the Tennessee Coal, Iron & Railroad Company, and in the other case the fund was sought to be subjected while in the hands of Huey, the clerk of the municipality of Bessemer. It was decided by this court in the case of *Skewes v. Huey*, 122 Ala. 674, 26 South. 1034, that on

grounds of public policy the fund could not be reached by garnishment process. We see no reason for departing from that decision.

There is no error in the record, and the judgment of the circuit court will be affirmed.

DEMANDS WHICH MAY BE SUBJECTED TO GARNISHMENT PROCESS are such only as the defendant in attachment could himself recover of the garnishee in an action of debt or *indebitatus assumpsit*: *Teague v. Le Grand*, 85 Ala. 493, 7 Am. St. Rep. 64, 5 South. 287.

GARNISHMENT.—THE SALARY OF A PUBLIC OFFICER due him from a municipal corporation cannot be garnished: Note to *Geist v. St. Louis*, 79 Am. St. Rep. 551. Compare the monographic note to *Leake v. Lacey*, 51 Am. St. Rep. 114, 115, on the garnishment of municipalities.

HAYES v. SOUTHERN HOME BUILDING & LOAN ASSOCIATION.

[124 Ala. 663, 26 South. 527.]

CONVEYANCES — ACKNOWLEDGMENT — CONCLUSIVE-NESS.—A proper certificate of acknowledgment to a conveyance is conclusive as to the facts stated therein, except upon proof of fraud or imposition in the procurement of the acknowledgment or conveyance.

ACKNOWLEDGMENT—CERTIFICATE OF—INTERESTED PARTY CANNOT TAKE.—Public policy forbids that the taking and certifying the acknowledgment of a conveyance shall be exercised by an officer who is financially interested in the conveyance.

ACKNOWLEDGMENT OF WIFE—CONVEYANCE OF HOMESTEAD—SEPARATE EXAMINATION.—Upon the alienation of a homestead, the separate examination of the wife and her acknowledgment are essential to the operation of the conveyance.

CONVEYANCES—ACKNOWLEDGMENT AND SEPARATE EXAMINATION OF WIFE—DISQUALIFICATION.—A stockholder in an association has a substantial interest in upholding a mortgage executed to it, and is, therefore, disqualified from conducting or certifying the separate examination and acknowledgment of a wife, where such mortgage is given upon a homestead.

CONVEYANCES—ACKNOWLEDGMENT OF WIFE—WAIVER OF INCOMPETENCY TO CONDUCT SEPARATE EXAMINATION.—A married woman has no power to waive incompetency on the part of the officer taking her separate examination required in the alienation of a homestead.

EQUITY—CANCELLATION OF MORTGAGE—DOING OF EQUITY.—When the facts creating the invalidity of a mortgage rest in parol, a complaining mortgagor may have relief in equity

to enjoin a sale thereunder and to decree the cancellation of the mortgage as a cloud upon his title, but he will first be required to do equity by returning any unpaid portion of the money borrowed or its equivalent with interest at the legal rate.

INTEREST—PLACE OF PERFORMANCE REGULATES.—A note or bond made payable at a particular place, or which is expressly made with reference to the laws of a particular state, is governed in respect to its obligation as to interest by the law of the place so stipulated as the place of performance.

BUILDING AND LOAN ASSOCIATIONS—PAYMENT ON STOCK IS NOT PAYMENT ON LOAN.—If a subscriber for stock in a building and loan association transfers it thereto as part security for a loan from it, agreeing to continue his payments on the stock, and to have its withdrawal value applied in part payment of the loan, payments made upon the transferred stock are not payments made upon the loan.

EQUITY—ASCERTAINING TERMS OF CONTRACT FROM VOID MORTGAGE.—A court of equity, having acquired jurisdiction for relief from a mortgage, may, if it is desired, settle the whole controversy, and in doing so, may look into the mortgage, if necessary, though it is void as a conveyance, for the purpose of ascertaining other terms of the contract between the parties.

EQUITY—CANCELLATION OF MORTGAGE—DOING EQUITY—ACCOUNTING.—If a stockholder of a building and loan association borrows money from it, gives a mortgage on his homestead as part security, transfers shares of stock as other security, and then brings a suit, in which he seeks to have the mortgage declared void on the ground that his wife's acknowledgment thereto was void, and in which he asks for an accounting, the withdrawal value of the stock may be ascertained and credited on the loan, and, if the credit is insufficient to extinguish the loan, with interest, the plaintiff should be required to pay the balance as a condition to relief respecting the mortgage.

Bill in equity brought by Hayes against the defendant association, a corporation. Its purpose was to enjoin a sale under a power contained in a mortgage given by Hayes to the association, for the redemption of the mortgage, and for an accounting. Hayes had subscribed for twenty shares of the defendant's stock, at one hundred dollars per share, and had afterward borrowed one thousand dollars of the association. As security for the loan, he mortgaged his homestead and transferred ten shares of his stock to the association. The by-laws of the association fixed a withdrawal value on the stock, and Hayes agreed to pay on the transferred shares a certain amount monthly until the stock held by him should mature and become of par value. It was agreed that Hayes was entitled to have the withdrawal value of the stock applied in part payment of the loan. The wife of Hayes joined in the mortgage, and her separate acknowledgment was taken by Howard Lamar, a notary, who was, at the time, a stockholder in the defendant association. It was decreed that the mortgage was not void, and should be foreclosed. The complainant appealed.

Smith & Smith and Norvell & Smith, for the appellant.

Cabaniss & Weakley, for the appellee.

607 SHARPE, J. So important is it to the security of titles that reliance may be placed upon the facts stated in a proper certificate of acknowledgment to a conveyance, that the law holds the certificate conclusive to establish those facts, subject to impeachment only by proof of fraud or imposition in the procurement of the acknowledgment or conveyance: *Grider v. American Freehold etc. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58, 12 South. 775; *Shelton v. Aultman etc. Co.*, 82 Ala. 315, 8 South. 232.

Because of the probative force so accorded to the certificate, as well as the usually important consequences of the conveyance itself, public policy forbids that the act of taking and certifying the acknowledgment shall be exercised by an officer who is financially interested in the conveyance: *Devlin on Deeds*, sec. 476; *Smith v. Clark*, 100 Iowa, 605, 69 N. W. 1011; *Miles v. Kelley*, 16 Tex. Civ. App. 147, 40 S. W. 599; *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437.

Such is the doctrine in respect of ordinary conveyances, and the reason is more cogent for its application when the separate examination of the wife is to be taken upon the alienation of the homestead, since by the statute the examination and acknowledgment are necessary to the operation of the conveyance and are essentials which no attestation or other form of acknowledgment can supply. Without substantial compliance with the statutory requirements in respect to the separate examination, no title passes and no rights attach by which a conveyance can be established: *Stripling v. Cooper*, 80 Ala. 256; *Strauss v. Harrison*, 79 Ala. 324; *Grider v. American Freehold etc. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58, 12 South. 775.

The acknowledgment in question was taken by a notary who was a stockholder in the mortgage association, 668 and as such, under the plan of the association, he was entitled to participate in the profits arising from loans and from other sources. He had therefore a substantial interest in upholding the attempted mortgage security which disqualified him to conduct or certify the separate examination and acknowledgment of Mrs. Hayes.

As bearing upon the effect of the officer's incompetency we are referred to the case of *Cooper v. Hamilton etc. Bldg. Assn.*, 97 Tenn. 285, 56 Am. St. Rep. 795, 37 S. W. 12, where it was

held that such acknowledgment taken by an interested officer was not void, but was voidable only upon proof of fraud or undue advantage with resultant injury to the complaining grantor. If such be the rule, incompetency becomes competency to nearly the same extent as where the officer has no objectionable interest, for even in the latter case equity will usually take cognizance to relieve from the consequences of fraud and imposition, and from the conclusive character attributed by our courts to the certificate, the result would be to declare that voidable which it would be most difficult to avoid.

Besides a married woman is without capacity to elect whether to avoid the transactions. Except to the extent that the statute has enlarged her capacities she is *civilter mortua* as at common law. The statutes of this state have not empowered her to waive incompetency on the part of the officer taking the separate examination required in the alienation of a homestead. It is a general rule that without statutory or judicial authority a married woman cannot elect to affirm or disaffirm a transaction which she was without legal capacity to engage in: *High v. Worley*, 33 Ala. 196.

Upon these considerations it must be held that the acknowledgment to the mortgage is void and that the mortgage itself is of no validity as a conveyance or security for the loan in question. The power of sale, being only one of its incidents, fails with the mortgage, and is subject to be perpetually enjoined.

Since the facts creating the invalidity of the conveyance rest in parol, complainant may have relief in equity to enjoin the sale and to decree the cancellation of the mortgage as a cloud upon his title. But the power of the court will only be exercised upon the condition that ⁶⁶⁰ the complainant will do equity by returning any unpaid portion of the money borrowed or its equivalent with interest at our legal rate: *Grider v. American Freehold etc. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58, 12 South. 775.

It is one of the agreed facts that the contract is not usurious under the law of Georgia. The bond given by complainant for the repayment of the loan is by its terms payable in that state, and it recites that the loan or advance was obtained by complainant as a member of the association under its by-laws, and the by-laws provide that all contracts with the association shall be deemed to have been made at the home office in Atlanta, Georgia.

Under established rules a note or bond made payable at a particular place or which is expressly made with reference to the laws of a particular state is governed in respect to its obligation as to interest by the law of the place so stipulated as the place of performance: *Hanrick v. Andrews*, 9 Port. 387; *Dickenson v. Branch Bank of Mobile*, 12 Ala. 54; *Hunt v. Hall*, 37 Ala. 702; 3 Am. & Eng. Ency. of Law, 1st ed., 516, 543, 561.

An exception to these rules is where such stipulations are found to be a mere device to evade the usury laws in which case they will be held void as against public policy. No such sinister purpose appears in this contract. The association being operated for the joint benefit of its members, it is essential to equality and fairness as between them that each member should abide and perform the mutual obligations imposed by its charter and by-laws upon all standing in similar relations. The conclusion follows that this loan was not usurious.

The same profit sharing feature of the association in connection with other terms of the contract is conclusive to show that complainant is not entitled to have payments made on account of his stock credited as payments upon the loan. The agreed facts show that his ten shares of stock were transferred to the association only as part security for the loan; that the rules, as well as the terms of the transfer indorsed on the stock, required payments thereon to be continued, and it is further agreed that complainant is entitled to have the withdrawal value of the stock applied in part payment of the loan. Under such conditions the relations in ⁶⁷⁰ which he stands to the association as a borrower and as a stockholder are separate and the accounts pertaining to each relation are distinct. That payments made on stock so transferred are not upon the loan was expressly held in *South Bldg. etc. Assn. v. Anniston etc. Co.*, 101 Ala. 582, 46 Am. St. Rep. 138, 15 South. 123, and the same principle was recognized in *Sheldon v. Birmingham etc. Assn.*, at present term.

Having acquired jurisdiction for relief from the mortgage, the court will, if desired, settle the whole controversy; and the defendant association having elected to treat the whole contract as ended, an account may be taken to ascertain the amount due upon the loan, including interest and premiums according to the terms of the contract and of the agreement upon which the cause was submitted. The attempted mort-

gage, though void as a conveyance, may be looked to, if necessary, for the purpose of ascertaining other terms of the contract.

The withdrawal value of the stock may also be ascertained and credited upon the amount found due on the loan. If complainant's credits are not thereby found sufficient to extinguish the loan described in the attempted mortgage with eight per centum per annum thereon to the time of the trial, then complainant should be required to pay the balance of such loan and interest as a condition to relief respecting the mortgage.

The decree appealed from not being in accordance with this opinion it will be reversed, and the cause will be remanded at the cost of the appellee.

ACKNOWLEDGMENT—CERTIFICATE OF—CONCLUSIVE-NESS—SEPARATE EXAMINATION OF MARRIED WOMAN.—In the absence of fraud or duress, a certificate of acknowledgment of a deed or mortgage is conclusive as to the facts therein stated: *Heeter v. Glasgow*, 79 Pa. St. 79, 21 Am. Rep. 46; and see *Davis v. Jenkins*, 93 Ky. 353, 40 Am. St. Rep. 197, 20 S. W. 283. If made and recorded as the statute requires it is the sole and conclusive evidence of the separate examination and acknowledgment of the wife: See the monographic note to *American Freehold etc. Co. v. Thornton*, 54 Am. St. Rep. 151, treating of the conclusiveness of certificates of the acknowledgment of deeds.

ACKNOWLEDGMENT—NECESSITY OF WIFE'S, TO CONVEYANCE OF HOMESTEAD.—A conveyance of a homestead by a husband and wife, without the separate acknowledgment of the wife, as required by the statute, is a mere nullity: Note to *Thompson v. New England etc. Security Co.*, 55 Am. St. Rep. 34. A literal compliance with the statute is not essential, but a substantial compliance is exacted: Note to *Frederick v. Wilcox*, 72 Am. St. Rep. 928.

ACKNOWLEDGMENTS TAKEN BY INTERESTED OFFICER—INVALIDITY.—An officer cannot properly take an acknowledgment of a deed to which he is a party or in which he is directly interested. It must be made before some officer not interested in the land: See the extended note to *Cooper v. Hamilton*, 56 Am. St. Rep. 798, 800, concerning the interest of an officer which will disqualify him from taking acknowledgments; and compare the note to *Smalley v. Bodinus*, 77 Am. St. Rep. 603.

EQUITY—CANCELLATION OF INSTRUMENTS.—A party praying for the cancellation of a conveyance must tender the money received thereon: *Cates v. Sparkman*, 73 Tex. 619, 15 Am. St. Rep. 806, 11 S. W. 846. A mortgagor who seeks in equity to cancel a mortgage on his homestead as a cloud on his title, on the ground of defects in its execution and acknowledgment, must offer to do equity by refunding the mortgage money with lawful interest: *Grider v. American Freehold etc. Mortgage Co.*, 99 Ala. 281, 42 Am. St. Rep. 58, 12 South. 775.

INTEREST—LAW OF PLACE.—Interest is to be paid according to the law of the place where the contract is made, unless the pay-

all persons who in any way claim or are reputed to claim any interest, etc., therein, however distinct and unconnected their several claims may be, the purpose of such bills being single, to settle the complainant's title. This position is untenable, we think. The statute does not in terms change the rule of pleading in the respect under consideration; and no such legislative intent is deducible from the language employed, nor is the abrogation of the rule against multifariousness necessary to the effectuation of the right conferred by the act. And it is not enough that the object of the bill is single in the sense that it seeks only to establish complainants' common title to certain lands. That is but one of several points of view from which the question of multifariousness *vel non* is to be considered; and there must not only be a common right in the complainants to quiet their title, but they must have this right against defendants, all of whom claim an interest in the same land or an interest in different parcels of land in the same or connected right. The question is, in other words, to be also regarded from the standpoints of the several defendants, and if they have no connected interest as respects subject matter or derivation of title or claim, they cannot be brought by one bill into court and put to a defense of their claims: *In re Prentiss*, 7 Ohio, pt. 2, 129, 30 Am. Dec. 203; *Colburn v. Broughton*, 9 Ala. 351; *Meacham v. Williams*, 9 Ala. 842; *Bolles v. Bolles*, 44 N. J. Eq. 385, 14 Atl. 593; *Lehigh Valley R. R. Co. v. McFarlan*, 31 N. J. Eq. 730; *Clay v. Gurley*, 62 Ala. 14.

The other ground of the demurrer sustained by the chancellor was not well taken. The prayer is a part of the bill, and the statutory demand upon the defendant to set forth and specify "his title, claim, interest, or encumbrance," etc. (Code, sec. 810), is properly made in the prayer: *Southmayd v. Elizabeth*, 29 N. J. Eq. 203-205.

The decree sustaining the demurrers on the ground of multifariousness is affirmed.

A BILL IS MULTIFARIOUS and demurrable which unites separate, distinct, and unconnected claims against several: *Stuart v. Coalter*, 4 Rand. 74, 15 Am. Dec. 731. A bill filed against several persons concerning distinct things or acts is demurrable, but the objection to multifariousness does not hold, if one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights: *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412, and note thereto. A petition for partition of several tracts against several defendants, all of whom are not interested in all the tracts, is bad for misjoinder: *Brownell v. Bradley*, 16 Vt. 105, 42 Am. Dec. 498. See, too, *In re Prentiss*, 7 Ohio, pt. 2, 129, 30 Am. Dec. 203.

GLASS v. HIERONYMUS.

[125 Ala. 140, 28 South. 71.]

CONTRACTS — STATUTE OF FRAUDS — EVIDENCE TO SHOW THAT DEED WAS INTENDED AS A MORTGAGE.—A statute prohibiting the creation of parol trusts in lands does not prevent the introduction of oral testimony to show that a deed, absolute in form, was intended as a mortgage.

MORTGAGES — DEEDS ABSOLUTE.—An oral agreement that a sale of land is on condition that the vendor shall have the right to repurchase or resell cannot be enforced by a bill in equity, to have the deed conveying the land, and absolute on its face, declared a mortgage.

MORTGAGES—DEEDS ABSOLUTE AS.—A grantee's admission, in a suit to declare an absolute deed a mortgage, that he had agreed to permit his vendor to repurchase the land before the sale was made does not remove the burden of proof from the grantor, but amounts to an admission that the writings do not evidence the whole transaction, and relaxes the rule requiring stringent proof that an absolute deed was intended as a mortgage, and inclines the court in favor of the right of redemption.

MORTGAGES—DEEDS ABSOLUTE AS—EVIDENCE.—If, in a suit to declare an absolute deed a mortgage, plaintiff's evidence tends to show that defendant advanced the balance due on the purchase price of the land, worth twice that amount, and took an absolute deed as security, and defendant testifies that there was a mere oral agreement that the complainant might repurchase the land, complainant is entitled to the relief sought, as the difference between the real value of the land and the amount advanced tends strongly to show that the land was deeded as mere security, and equity favors the right to redeem in doubtful cases.

Pillans, Torrey & Hanaw, for the appellant.

G. L. & H. T. Smith, for the appellees.

144 SHARPE, J. Stated generally, the grounds for relief alleged in the bill are, substantially, that the complainants being indebted for lands they applied to the appellant for a loan wherewith to pay the debt, and that he agreed to and did lend them money for that purpose; that as part of the same transaction it was agreed that complainants, to secure the loan, should transfer to appellant their contractual interest in the lands, and should cause their vendor to convey the title to appellant by a **145** deed to be absolute in form, but which was to stand and be considered only as a mortgage securing the loan, and that, pursuant to the agreement, appellant, by way of making the loan, paid the complainants' debt to the vendor, who, under complainants' authority, conveyed by deed to appellant. It is further alleged in substance that appellant has

repudiated the agreement and has sold the land mainly on a credit to others made defendants to the bill, who bought with notice of complainants' equities, etc., and the bill prays to have the conveyance declared a mortgage, and that complainants be allowed to redeem the lands, or to have the unpaid purchase money due from appellant's vendees either paid or secured to complainants.

From a decree sustaining demurrers to the bill an appeal was taken to this court where the decree was reversed: See *Hieronimus v. Glass*, 120 Ala. 46, 23 South. 674. The present appeal is by the defendant Glass alone from a decree rendered after submission on bill, answers and evidence.

It is urged in behalf of appellant that the bill be reconsidered, especially with reference to the statute which prohibits the creation of parol trusts in land. After doing so we hold to the opinion rendered on the former appeal that the transaction alleged to have occurred between complainants and the appellant is within the class which under our decisions is saved from that statute by the established principle which allows a deed absolute in form to be decreed a mortgage on parol proof that it was so intended.

We are not assured, however, of the necessity for modifying the case of *Moseley v. Moseley*, 86 Ala. 289, 5 South. 732, as is proposed by the former opinion in this case, for the supposed conflict between the two cases is not apparent. From the report of the *Moseley* case it is not clear that it involved a loan or more than an arrangement between the parties whereby the original vendee's place in a land purchase was assumed by a third person who paid a balance due on the land in consideration of receiving a conveyance which he verbally agreed should be treated as a mortgage. A mortgage can exist only as ¹⁴⁶ security for a debt or liability, and if the arrangement between those parties left no obligation on the part of the first vendee to refund to the third person, then an agreement between the parties to call the conveyance a mortgage could not have made it such in fact. If the decision in *Moseley's* case was based on such a transaction, its value as authority should not be impaired.

The theory of the present bill is that complainants borrowed the money and that its payment in discharge of complainants' debt for purchase money invested them with a perfect equity in the lands, which interest, together with the legal title, passed to appellant as security for the loan. There can be no

distinction in principle between such a case and that of *Parmer v. Parmer*, 88 Ala. 545, 7 South. 657, where a vendee holding a perfect equity in land was allowed to show by parol that a deed made by his vendor to his creditor was intended to secure a debt held by the creditor and so to have a decree declaring the deed a mortgage.

Appellant's answer denies that he loaned the money, and avers in substance that complainants requested him to buy the lands and discharge their liability for purchase money which they were unable to meet. That accordingly he bought the lands for himself without any understanding or agreement that the conveyance to him should be held as a mortgage. It further avers that "while respondent, as before stated, determined to buy the lands mentioned as an investment that might be profitable, he verbally stated to one of the members of said firm of Hieronymus Brothers, after deciding to buy the land for himself and pay the notes of respondents (complainants), that if they were able and would within twelve months pay him the purchase price for said lands with a profit on his investment of ten per cent, he would convey them the said lands." It adds that this was a mere gratuitous offer to the complainants, and that three years passed without their offering to buy the lands from him, whereafter he sold them to the other defendants.

Referring to the evidence, it appears that the negotiation with appellant was conducted on the part of complainants by William T. Hieronymus, and besides those ¹⁴⁷ two no one was present when the agreement was made. As to its terms their testimony is in direct conflict, that of Hieronymus being substantially in accord with the allegations of the bill, while that of appellant conforms to his answer with some variance. Instead of stating a gratuitous promise to convey to complainants on their paying him in one year the purchase money with ten per cent, he testifies that William T. Hieronymus asked him to buy the lands, saying he had a customer to whom he could sell within three months, within which time he would buy them back with ten per cent added to the money. Adopting the language of his deposition he further says: "Several days after that Hieronymus came back. I told him I was willing to buy said lands, and that I would give him a year to dispose of it and I was to take my money with the ten per cent added and pay the taxes for that year," which proposition he says was accepted by Hieronymus. This promise, if made as stated, was

before the money was paid or the conveyances executed, and would not be taken as gratuitous, but would be considered as entering into the consideration for the conveyance which followed. If appellant's version be the true one, the agreement was for a sale upon condition that complainants should have the right to purchase or resell. Such an agreement could not be enforced herein for the double reason that it lacks the written evidence required by statute and that the bill is not framed for such relief.

But apart from its effect as a defense, appellant's statement of the trade amounts to an admission on his part that the writings did not evidence the whole agreement, and this admission affects materially the determination of issues like the present. Where the writings must be departed from entirely in order to find the full agreement, and where, as here, the issue is reduced to whether it was for a right to repurchase or a right to redeem, the rule which requires stringent proof to supplant a deed absolute in form by a verbal mortgage becomes at once relaxed, and its place is taken by another rule which, though not relieving the complainant from the burden of proving his case, yet inclines the court in ¹⁴⁸ favor of the right of redemption and, therefore, to consider the transaction as a mortgage: *Crews v. Threadgill*, 35 Ala. 334; *Turnipseed v. Cunningham*, 16 Ala. 501, 50 Am. Dec. 190; *Locke v. Palmer*, 26 Ala. 312; *Turner v. Wilkinson*, 72 Ala. 361; *Douglass v. Moody*, 80 Ala. 61; *Peagler v. Stabler*, 91 Ala. 308, 9 South. 157; *Daniels v. Lowery*, 92 Ala. 519, 8 South. 352; *Reeves v. Abercrombie*, 108 Ala. 535, 19 South. 41.

In *Turner v. Wilkinson*, 72 Ala. 361, the absence of written evidence of the debt was considered a material, but not a conclusive, circumstance in determining whether a debt existed. The fact that the grantee of property had by the conveyance security in his own hands was deemed sufficient in connection with other circumstances to account for his failure to take a note or other written memoranda of the debt.

In this case on the subject of the alleged loan William T. Hieronymus testifies that appellant applied to him for payment long after the agreement. He is corroborated by two other witnesses who testify to statements made by appellant tending to show that he held the complainants as his debtors. All this is opposed by appellant's testimony. For corroboration on this point he relies on his shop books, which were introduced, and

on the testimony of his bookkeeper to effect that no charge was made on his books of such a loan, but that the land payment was there entered as an investment.

Some witnesses other than those referred to were examined for the complainants, but such competent testimony as they furnish is in the main contradicted and relates to circumstances which do not weigh strongly for either party.

By uncontradicted evidence it is shown that the lands were worth nearly or quite double the amount paid by appellant. In cases of this nature, such a fact is usually considered as having an important bearing in favor of the mortgage theory: Authorities *supra*.

Equity favors the right of redemption when it is doubtful whether a mortgage or a conditional sale was meant for the reason that by it no hardship will fall on either party. Here, while the evidence is not fully convincing on the issue, it seems to preponderate in favor of ¹⁴⁹ the complainants, and applying to it the rules referred to we are brought to concur with the chancellor in the conclusion that they are entitled to relief.

Let the decree be affirmed at appellant's cost.

MORTGAGE.—A DEED ABSOLUTE on its face may be shown to be a mortgage: *McFarlane v. Loudon*, 99 Wis. 620, 67 Am. St. Rep. 883, 75 N. W. 394; and this by parol evidence: *Moore v. Madden*, 7 Ark. 530, 46 Am. Dec. 298; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671. Compare *Hale v. Jewell*, 7 Greenl. 435, 22 Am. Dec. 212; *Bragg v. Massie*, 38 Ala. 89, 79 Am. Dec. 82. But such evidence must be clear and convincing: *Keithley v. Wood*, 151 Ill. 566, 42 Am. St. Rep. 265, 38 N. E. 149; *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 868, 25 Atl. 807; and even then should be received with caution against the sworn answer of the respondent: *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431.

NEVILLE v. KENNEY.

[125 Ala. 149, 28 South. 452.]

ADMINISTRATORS' SALES — COLLATERAL ATTACK UPON.—A petition by an administrator to the probate court for the sale of lands of his intestate to pay debts is essentially a proceeding in rem, and after jurisdiction has attached in such proceeding, the decree of the court cannot be collaterally attacked for errors and irregularities subsequently occurring in such proceedings. Hence a failure to make an heir, whether adult or infant, a party to the proceeding is immaterial, and does not render the decree or sale open to collateral attack, although such error may work a reversal on direct appeal.

ADMINISTRATOR'S SALE — COLLATERAL ATTACK SHOWING ABSENCE OF NECESSITY FOR.—While it may be true, as matter of fact, that no debts exist against the estate at the time of filing a petition by an administrator to the probate court for the sale of lands of his intestate to pay debts, for which such lands could be decreed to be sold, still, upon collateral attack, the existence or nonexistence of debts as a fact is not the proper inquiry in determining whether the jurisdiction of the court has attached. This question must be determined from the face of the record, consisting of the petition and decree based thereon, and if nothing appears upon the face of the record showing when the intestate died, nor how long the administration has been pending, it must be presumed upon such collateral attack that the debts alleged in such petition accrued before the death of the intestate.

ADMINISTRATOR'S SALES—JURISDICTION TO ORDER, WHEN ESTABLISHED.—The filing of a petition by the administrator for the sale of the lands of the intestate to pay debts, averring jurisdictional facts, confers jurisdiction upon the court, and the essential jurisdictional averments are the existence of debts of the estate and the insufficiency of personal property to pay them. The jurisdiction is not acquired by any order or decree of the court, but it attaches upon the filing of a proper petition by the proper party, and after jurisdiction has thus attached, and the court proceeds to a decree, although erroneous in the adjudication of the facts, the jurisdiction remains, unless it appears upon the face of the decree that in the adjudication of the facts the court ascertained some jurisdictional fact to be wanting.

ADMINISTRATOR'S SALES.—JUDICIAL KNOWLEDGE of a fact is but a rule of evidence dispensing with the necessity of offering evidence of such fact, and such knowledge can no more affect the jurisdiction of the court upon the filing of a proper petition by the proper party for the sale of lands of an intestate to pay debts, than the independent knowledge of the judge of the court of the nonexistence of the alleged indebtedness.

ADMINISTRATOR'S SALES—ALLEGATIONS OF INDEBTEDNESS.—In averring the indebtedness of an estate in a petition to sell lands of an intestate to pay debts, it is not necessary to specify such debts nor is any particular form of averment required. It is sufficient to allege in general terms the existence of the debts of the estate.

EQUITY—DISMISSAL OF BILL IN VACATION.—While a bill in equity should never be finally dismissed by decree in vacation, on motion to dismiss for want of equity, without first giving

complainant an opportunity to amend, the reason for the rule ceases when it is manifest that the bill cannot be amended without entire departure so as to give it equity.

F. G. Bromberg, for the appellant.

G. L. & H. T. Smith, for the appellee.

¹⁵³ DOWDELL, J. The appeal in this case is prosecuted from the decree of the chancery court dismissing complainant's bill for want of equity on respondent's motion. The purpose of the bill is the sale of the land described, for division between the complainant and respondent as tenants in common. The complainant ¹⁵⁴ claims title to an undivided one-fourth interest, by descent from her grandfather, Frederick Fleming, deceased. The bill charges that the respondent acquired title to the land by purchase at a sale made by the administrator of Frederick Fleming, deceased, under a decree of the probate court of Mobile county. The petition filed by the administrator in the probate court for the sale of the land is made an exhibit to the bill, and it is charged that the name of the complainant, who was at the time an infant, was omitted from the petition as one of the heirs at law of the said Frederick Fleming, deceased, and that no guardian ad litem was appointed. It is also charged that the testimony was not taken in the cause as in chancery cases, as provided by the statute.

It is here contended by the appellant, in the first place, that the petition filed by the administrator in the probate court shows on its face that the court never acquired any jurisdiction in the proceeding to sell the land, and that, therefore, the decree of sale made by that court and all proceedings had thereunder are null and void. And in the second place, if the probate court acquired jurisdiction, that the decree is invalid as to the complainant, for the reason that she was never made a party to the proceedings had for the sale of the land.

From the foregoing statement it will be seen that we have presented for consideration practically but two questions. The first is as to whether or not the decree of the probate court for the sale of the land is void for want of jurisdiction; the second is as to whether or not, after jurisdiction is acquired by the probate court in a proceeding to sell land of the estate of a decedent, errors subsequently occurring in the proceedings will avoid the same.

It may be here observed that if the decree of the probate court is void for want of jurisdiction, it is void in toto, and no

title could pass to the purchaser at the sale had under the decree, all subsequent proceedings being an absolute nullity. On this phase of the facts the bill would be wanting in equity, as there could be no partition ¹⁵⁵ of the land between complainant and respondent as joint owners.

We will consider the two questions presented in the inverse order of their statement above. That a petition by an administrator to the probate court for the sale of lands of his intestate's estate for the payment of debts is essentially a proceeding in rem has been so often decided by this court that it is unnecessary to cite authorities. And it is equally as well settled that in such cases, after jurisdiction has attached upon the filing of a petition by the proper party, who is the administrator, containing jurisdictional averments, the decree of the court, for errors and irregularities subsequently occurring in the proceedings, cannot be brought into question upon a collateral attack. It has also been definitely determined by this court that the failure to make an heir a party to the proceeding, whether adult or infant, is immaterial, does not render a decree of sale open to collateral attack, although such an error may work a reversal on direct appeal. The names of the heirs not being an essential jurisdictional averment in the petition, their omission, when the decree is called into question collaterally, is deemed an error or irregularity intervening after jurisdiction acquired: *Lyons v. Hamner*, 84 Ala. 197, 5 Am. St. Rep. 363, 4 South. 26; *Duval v. McLoskey*, 1 Ala. 708; *Duval v. P. & M. Bank*, 10 Ala. 636; *Field v. Goldsby*, 28 Ala. 218, 65 Am. Dec. 341; *Matheson v. Hearin*, 29 Ala. 210; *King v. Kent*, 29 Ala. 542; *Satcher v. Satcher*, 41 Ala. 26, 91 Am. Dec. 498.

We come now to the consideration of the first proposition presented by appellant's contention: Did the probate court acquire jurisdiction in the proceedings had in that court for the sale of the land in question? This must be determined from the averments contained in the petition filed by the administrator in that court. The petition was filed February 18, 1879. No question is raised as to the averment in the petition of an insufficiency of personal property to pay debts, for it is distinctly averred that there was no personal property, but it is here urged that the averment in the petition as to the existence of debts of the estate is insufficient. The ¹⁵⁶ averment of the petition as to debts is as follows: "Your petitioner further shows that there are debts and liabilities still existing against

said estate which will fully appear by schedule 'A' hereto annexed, and which petitioner prays may be taken and considered as a part of this petition. . . . Your petitioner therefore avers that the personal estate is insufficient to pay the debts thereof and that to pay the debts now justly due and owing to sell that certain piece or lot of land which is described as follows," etc. Schedule "A" contains a statement of the taxes due the city of Mobile for the years 1875, 1876, 1877, and 1878, and the taxes due the state of Alabama for the year 1878. It is averred in the bill that Frederick Fleming died intestate December 2, 1865, and that at the date of the filing of the petition the administration had been pending over thirteen years. From this statement in the bill it is now argued by counsel for appellant that the petition shows on its face that the alleged indebtedness consisted of taxes, which accrued after the death of the petitioner's intestate, and was therefore not a debt of the intestate, and, there being no debts, the probate court was without jurisdiction to decree a sale of land to the estate. While it may be true as a matter of fact, that there existed no debts at the time of the filing of the petition, for which the lands of the estate could be decreed to be sold, still, upon a collateral attack, the existence or nonexistence of debts as a fact is not the proper inquiry in determining whether the jurisdiction of the probate court had attached. This question must be determined from the face of the record, and this record is made up of the petition and the decree based thereon. Nothing appears upon the face of the petition or decree showing when the intestate died, nor how long the administration had been pending. The filing of the petition by the proper party, the administrator, averring jurisdictional facts, confers jurisdiction on the court. The essential jurisdictional averments are the existence of the debts of the estate and the insufficiency of personal property to pay the same. The jurisdiction is not acquired by any order or decree of the court, but it attaches upon the filing of a proper petition by a proper party. And after jurisdiction ¹⁵⁷ has attached upon the filing of such petition, and the court proceeds to a decree, although erroneous in the adjudication of the facts, the jurisdiction remains, unless it should appear upon the face of the decree that in the adjudication of the facts the court ascertained some jurisdictional fact to be wanting. It is insisted by counsel for appellant that the court judicially knew, when the petition for the sale of the land was filed by the administrator,

that the administration had been pending in said court for thirteen years. Judicial knowledge of a fact is but a rule of evidence that dispenses with the necessity of offering evidence as to such fact. It can no more affect the question of the jurisdiction of the court attaching upon the filing of the petition than the independent knowledge of the judge of the court of the nonexistence of the alleged indebtedness. In the averment of indebtedness it is not necessary to specify the debts, nor is any particular form of averment required. It is sufficient to allege in general terms the existence of the debts of the estate. The petition here did allege in general terms the existence of indebtedness and in addition particularized the same as taxes due and owing for certain years. There is nothing on the face of the petition showing when the intestate died or how long the administration had been pending. When considered alone, and this must be done, in determining the question of jurisdiction attaching, the reasonable conclusion to be reached as to schedule "A," which is made a part of the petition taken in connection with other averment in the petition, is, that the taxes accrued before the death of the intestate. We are of the opinion, and so hold, that the petition contained the essential jurisdictional averments, and the court having acquired jurisdiction upon its filing and proceeded to decree, the decree is not open to collateral attack upon the allegations of the bill.

While a bill should never be finally dismissed by decree rendered in vacation on motion to dismiss for want of equity without first giving the complainant an opportunity to amend, the reason of the rule ceases when it is manifest that the bill cannot be amended without entire departure so as to give it equity. Such is the case here. There is no error in the record, and the decree must be affirmed.

PROBATE SALE—COLLATERAL ATTACK.—Proceedings in probate for the sale of a decedent's estate are in rem, and cannot be attacked collaterally: *Satcher v. Satcher* 41 Ala. 26, 91 Am. Dec. 498. Compare *Smith v. Wildman*, 178 Pa. St. 245, 56 Am. St. Rep. 760, 25 Atl. 1047. Mere irregularities are not ground for collateral attack: *Bradley v. Drone*, 187 Ill. 175, 79 Am. St. Rep. 214, 58 N. E. 304. Failure to state the names of the heirs in the petition cannot be taken advantage of in collateral proceedings: *Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243; *Lyons v. Hamner*, 84 Ala. 197, 5 Am. St. Rep. 363, 4 South. 26. If the petition of the administrator is sufficient to give the court jurisdiction to decree a sale, such decree and a sale thereunder are valid as against collateral attack, notwithstanding irregularities in the supervening proceedings: *Moore v. Cottingham*, 113 Ala. 148, 59 Am. St. Rep. 100, 20 South. 994.

PROBATE SALE.—JURISDICTION of a probate court to order the sale of lands of a decedent attaches when a petition is filed by the proper party, setting forth any of the statutory grounds for a sale: *Goodwin v. Sims*, 86 Ala. 102, 11 Am. St. Rep. 21, 5 South. 587; *Hodge v. Fabian*, 31 S. C. 212, 17 Am. St. Rep. 25, 9 S. E. 820.

STACEY v. WALTER.

[125 Ala. 291, 28 South. 89.]

DEEDS—ESTOPPEL AGAINST MARRIED WOMEN.—A married woman having capacity to convey her land without consideration binds herself by such a conveyance by its recital of a valuable consideration, and is estopped, like any other grantor, to show that there was in fact no consideration.

DEEDS—PAROL AGREEMENT TO VARY TERMS OF.—A parol agreement, made contemporaneously with the execution of a deed, that it should be destroyed at the expiration of one year, is not sufficient to invalidate it. In the absence of fraud, accident, or mistake in the execution of such deed, it must be given full effect.

Hill & Hill and G. Macdonald, for the appellant.

Gunter & Gunter, for the appellee.

²⁹⁵ **McCLELLAN, C. J.** In *Vincent v. Walker*, 93 Ala. 165, 9 South. 382, it was ruled that a married woman was not estopped by the recital of a valuable consideration in a deed executed by her conveying land constituting her separate estate to show that there was in fact no consideration for the conveyance. This conclusion was expressly rested upon the considerations that the transaction was essentially a gift by the wife to the grantee, that under the statute which then obtained a married woman could not give away her land, but could sell it only, and that the conveyance not being one she had competency to make, she could not be estopped by its recitals to show there was no consideration for it. We said in that case, after referring to and recognizing the general rule whereby a grantor whose deed recites a valuable consideration is estopped to impeach the recital: "But this rule cannot apply to a married woman so as to prevent her showing the absence of all consideration for her deed. With respect to a married woman under such disabilities as rested on her under the statute of force at the time of this transaction, the rule is that only a valid deed—such deed as the statute authorized her to execute—can raise up an estoppel against her. 'It is clear that a married woman, under disabili-

ties, cannot be estopped just as if she were sui juris, and the only way of determining in what cases she may be estopped is to ascertain: 1. Whether the alleged estoppel grows out of a judgment, deed, contract or tort; and 2. Whether such judgment, deed, contract, or tort is binding as such on the married woman': 14 Am. & Eng. Ency. of Law, 637, 638; *Alexander v. Saulsbury*, 37 Ala. 375-378. The statute did not confer on Mrs. Vincent and her husband capacity to dispose of her land as was attempted in this transaction. They had power to sell it, but not to mortgage it, and not to give it away. The statute contemplates, and provides for, only a sale in the legal sense of the term, a transfer of it for a valuable consideration, and in terms makes provision for the uses and ends to which the consideration received shall be devoted. The proceeds of the sale were to be invested in other property for the wife, or used in 'such manner ²⁹⁶ as is most beneficial for the wife': Code 1876, secs. 2707, 2709. In other words, as said by Brickell, C. J.: "The power conferred by the statute and the constitution (and it is strictly, narrowly, enabling) is to sell, converting the thing sold into money or its equivalent, and no other power can be exercised': *Shulman v. Fitzpatrick*, 62 Ala. 571; *Peeples v. Stolla*, 57 Ala. 53." It thus clearly appears that the decision in *Vincent v. Walker*, 93 Ala. 165, 9 South. 382, went entirely upon the ground that under the statute existing at the time of the transaction there involved a married woman could only sell her property, and that she could not bind herself at all by a deed for which in point of fact there was no valuable consideration. The statute now of force and which obtained at the time of the transaction here involved is entirely different in respect of the question under consideration. It is now provided that the wife has full legal power to contract as if she were sole, except as otherwise provided by law, and that with the assent and concurrence of her husband she may alienate or mortgage her property: Code, secs. 2526, 2528. Her competency is no longer restricted to a sale of her separate property. She may alienate it. Any conveyance of her title is, of course, an alienation. A deed for a good consideration, for love and affection, is an alienation. A deed of gift is an alienation, and binds her as fully as a conveyance on valuable consideration would. Having thus the capacity to convey her land without consideration, she binds herself by such a conveyance and by its recital of a valuable consideration, and is estopped like any other grantor to show there was no consideration. And it follows that so far as the present

bill proceeds upon the theory that the complainants are entitled to relief for the want of consideration for the deed of Mrs. Stacey and her husband to the respondents, the recital to the contrary notwithstanding, it is wholly without equity.

For the rest, we do not find in the bill any averment of a mistake of fact conducing to the execution of the deed or any fraud in the procurement of its execution, which would justify a court of equity in decreeing its cancellation. To the contrary, the averments of the ²⁰⁷ bill are unmistakably clear to the exclusion of all mistake of fact and to the conclusion that the conveyance was executed in precise accordance with the intention of all the parties, all the facts and circumstances being known to them and consciously before them at the time. And so in respect of fraud: No misrepresentation of fact is averred, but only that the respondent grantees promised orally at the time the deed was executed to cancel and destroy it a year afterward, and that they have failed to so cancel and destroy the instrument. It is not even averred that they had no intention of complying with this promise when it was made, or made it with false and fraudulent intent. The case made in this regard, therefore, is essentially one for the enforcement of a contemporaneous parol agreement or understanding to the destruction of the duly executed deed of the complainants; and no more in equity than at law can any relief be predicated upon such a state of facts: *Ware v. Cowles*, 24 Ala. 446, 60 Am. Dec. 482; 2 Pomeroy's Equity Jurisprudence, sec. 854, and note.

The decree of the city court sustaining the demurrer to the bill must be affirmed.

ESTOPPEL.—RECITALS IN A MARRIED WOMAN'S DEED do not create an estoppel against her or those claiming under her: *Cockrill v. Hutchinson*, 135 Mo. 67, 58 Am. St. Rep. 564, 36 S. W. 875. See, further, the monographic note to *Trimble v. State*, 57 Am. St. Rep. 170-175.

PAROL AGREEMENTS TO VARY WRITINGS are considered in the monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 659-672.

to prevent, hinder, or delay the collection of other debts, are questions not raised on this appeal.

There is no evidence tending to show that M. E. Cox acted with actual fraudulent intent. The mere act of selling such property by M. E. Cox in the ordinary course of trade and the application of the proceeds partly in ⁸²⁵ the payment of debts and partly for their family and farm, does not in itself tend to show actual fraud. Neither do the facts in evidence show that M. E. Cox was insolvent or that she did not have ample property other than that in the mortgage which might have been subjected to her debts.

Upon the facts in evidence, as stated in the agreed abstract, it cannot be here held that either the original mortgage which conveyed nothing subject to the claims of creditors, or the subsequent purchase and passing of goods under its terms can be charged to the appellants as a constructively fraudulent disposition of property without regard to insolvency of the appellees, which is not here shown. The mortgage was admissible in evidence, but there was error in giving the general affirmative charge for the defendants, for which the judgment will be reversed and the cause remanded.

A TRANSFER OF A HOMESTEAD CANNOT BE FRAUDULENT as to creditors of the grantor: *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433; *Gray v. Patterson*, 65 Ark. 373, 67 Am. St. Rep. 937, 46 S. W. 730, 1119; *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595, 84 N. W. 859. But see *Kettleschlager v. Ferrick*, 12 S. Dak. 455, 76 Am. St. Rep. 623, 81 N. W. 889.

A CHATTEL MORTGAGE, WITH THE RIGHT TO SELL the goods mortgaged, in the ordinary and usual course of trade, is valid, provided it appears therein that such sales are to be for the benefit of the mortgagee, and that the mortgagor is to account to him for the proceeds of the sales: *Noyes v. Ross*, 23 Mont. 425, 75 Am. St. Rep. 543, 59 Pac. 367. Compare *Pabst Brewing Co. v. Butchart*, 67 Minn. 191, 64 Am. St. Rep. 406, 69 N. W. 809.

**TENNESSEE COAL, IRON & RAILROAD COMPANY v.
HANSFORD.**

[125 Ala. 849, 28 South. 45.]

NEGLIGENCE—RIGHT TO CROSS RAILROAD TRACK.—

A person who has a right to go upon a railroad track for the mere purpose of crossing it on his way home must exercise such right immediately after his ascertaining by his stopping sufficiently long to look and listen to see that he could proceed with safety to himself. He has no right to linger upon or walk along the track, or upon the right of way of the railroad company in dangerous proximity to the track. By so doing he becomes a trespasser, and cannot recover for an injury caused by the negligence of the railroad company while he is thus a trespasser. In such case the burden of proof is upon the party injured to show that he was in the exercise of his right of immediately crossing the track, and that the acts of negligence alleged by him on the part of the railroad company were the proximate cause of the injury.

NEGLIGENCE—RIGHT TO CROSS RAILROAD TRACK—

EMPLOYE IN ANOTHER BRANCH OF SERVICE.—In an action against a railroad company to recover for personal injury alleged to have been caused by the negligence of the company in failing to have a headlight on its locomotive, and in failing to give signals of its approach, the fact that the person injured who was on the track at the time was employed by the company in another and distinct branch of its service does not necessarily impose any greater duty upon the company at the time and place of the accident than that due to any other person upon the track.

NEGLIGENCE—RIGHT TO CROSS RAILROAD TRACK—

DUTY TO STOP, LOOK, AND LISTEN.—If in an action against a railroad company to recover for personal injury received in an attempt to cross the railroad track it clearly appears that if the person injured had stopped to look and listen before attempting to cross the track there was nothing to prevent his seeing the approaching locomotive and saving himself from injury, he must be deemed guilty of negligence, barring his recovery. If he did not stop and look and listen, or if he did, and then attempted to cross immediately in front of the approaching locomotive, he was guilty of negligence which would bar a recovery.

NEGLIGENCE—RIGHT TO CROSS TRACK—EVIDENCE.—

In an action against a railroad company to recover for personal injury received in attempting to cross the railroad track, the facts as to whether many persons crossed the track at the point of the accident, the time of such crossing, whether there was a headlight on the engine, or the bell was rung or a whistle blown at the time of the injury, and whether such witnesses had an opportunity to see and hear the facts above stated, are all pertinent to the inquiry, and admissible in evidence.

EVIDENCE.—WITNESSES MAY TESTIFY TO THE AB-

SENCE of a thing or the nonappearance of an event, if it is shown that they were in a position to see and hear the thing inquired about.

W. Percy and W. L. Grubb, for the appellant.

Gregg & Thornton and Ward & Houghton, for the appellee.

³⁶⁰ DOWDELL, J. This is an action for damages for an alleged negligent killing of appellee's intestate by a locomotive engine while being operated by the servants ³⁶¹ and employés of the defendant company over its track or road. The amended complaint contained twelve counts. The court below gave the affirmative charge for the defendant on all of said counts except the seventh. This count alleges in substance that appellant, the Tennessee Coal, Iron & Railroad Company, on December 7, 1896, owned and operated a railroad, engines, locomotives and cars and other appurtenances thereto belonging, at or near a town or village known as Ensley City, in said county of Jefferson and state of Alabama; that there was a footway or path leading across one of defendant's said railroads, over which many persons passed daily about 5:30 P. M., which the defendant, its agents and servants, well knew; that on said date, and about 5:30 P. M., said time being about dark, the plaintiff's intestate was walking along said path at a point where the same crosses said railroad, when the defendant, its agents or servants, without giving any notice of the approach of one of its engines or locomotives to said crossing by ringing a bell or blowing a whistle, and without the use of a headlight on said locomotive, which it was its duty to do in the premises, did at the time aforesaid, and when the plaintiff's intestate was crossing said track at said crossing, violate its said duties, and negligently propelled said engine or locomotive along said track toward and across said crossing, causing said locomotive or engine to strike, run over and kill said intestate.

To this count six pleas were filed by the defendant, the first being the general issue and the remaining five setting up contributory negligence on part of plaintiff's intestate. On this state of the pleading, issue being joined, a trial was had, resulting in a verdict for the plaintiff.

The charge of negligence in the complaint is predicated upon acts of omission on the part of the defendant and consisted in the failure of defendant's agents or employés in control and management of the locomotive to ring the bell or sound the whistle, and in the failure to have a headlight burning on its approach to the place of the accident. These are the only acts of negligence averred as a proximate cause of the injury. There is ³⁶² no charge of negligence on the part of defendant or its servants in control of the engine or locomotive in a failure to maintain a lookout, and under the issue so made up, the ques-

tion of the duty of maintaining a lookout, whether general or special, was wholly irrelevant.

While the said deceased had the right to go upon the defendant's railroad track for the purpose of crossing the same on his way to his home, and this right of crossing said track he had, regardless of the existence of a pathway, without being a trespasser in the exercise of such right, yet under the averments in the complaint this right was only a crossing right, to be exercised immediately after his ascertaining by his stopping sufficiently long to look and listen to see that he could proceed with safety to himself. He had no right to linger upon the track or walk along the same, or upon the right of way of defendant in dangerous proximity to the track, the doing of which would constitute him a trespasser: Louisville etc. R. R. Co. v. Hairston, 97 Ala. 352, 12 South. 299; Stringer v. Alabama etc. R. R. Co., 99 Ala. 397, 13 South. 75; Ensley Ry. Co. v. Chewning, 93 Ala. 24, 9 South. 458.

The burden of proof was upon the plaintiff to show that deceased was killed by defendant's locomotive while the deceased was in the exercise of this right of immediate crossing and without delay, and that the acts of negligence alleged in the complaint on the part of defendant were the proximate cause of the injury. The fact that plaintiff's intestate was himself an employé of defendant company, being employed at work at its furnaces, was wholly immaterial under the issues in the case. Under the averments in the complaint, his relation to the defendant company as an employé in another and different branch of its service, imposed no greater duty upon the defendant at the time and place mentioned than that due to any other person exercising the legal right of crossing its tracks. We think that the evidence as disclosed by the record fails to show that the plaintiff has discharged the burden placed upon her by the law in making out her case. There is no testimony by an eye-witness to the occurrence that the decedent was crossing the tracks at the time he was struck by the locomotive, ³⁰³ nor any evidence from which we think such fact could be reasonably inferred, while, on the contrary, the testimony of the eye-witnesses to the killing, as well as the tendencies of the whole evidence, go to show that the deceased was not crossing nor in the act of crossing, as he had a right to do, at the time of the injury, but was standing or lingering upon the track.

The plaintiff's witness, Dode Blocton, expressly disclaims having seen decedent at all until after he had been struck

and carried along the track by the engine. His testimony throws no light on where he was when struck or what he was doing when he was struck. Will Black, another witness for the plaintiff, testifies that he first saw him step on the track above the toolhouse toward the cinder dump and walk along the track twenty feet farther down than the path, where he was struck by the engine. His testimony clearly shows that the decedent was a trespasser: *Ensley Ry. Co. v. Chewning*, 93 Ala. 24, 9 South. 458. Nelson Goree, another of plaintiff's witnesses, testifies that when he first saw the decedent, he, decedent, was standing between the sidetrack and the main line in front of the toolhouse. He then saw him no more for two or three minutes, after which the engine came along past the toolhouse and struck him. The witness did not see him when he was struck. He saw him standing within three and one-half feet of the main track two or three minutes before the train came along, and saw him no more then until after he was killed. According to this witness, the decedent had been standing for two or three minutes on the right of way between the two tracks and in dangerous proximity to them. This was not the exercise of his legal right of immediate crossing: *Stringer v. Alabama etc. R. R. Co.*, 99 Ala. 397, 13 South. 75; *Louisville etc. R. R. Co. v. Hairston*, 97 Ala. 351, 12 South. 299.

Johnson and Perdue, witnesses for the defendant, each testify that the decedent stood in the center of the main line from two to five or six minutes waiting for Perdue to finish unloading tools from a hand-car, and to go home with him. These are the only eye-witnesses to the accident, except the witness, Mandy. This witness testifies that he was one hundred yards from the ~~364~~ place of accident, waiting to relieve the engineer of the engine which ran over the decedent. He saw the engine coming down the track toward the toolhouse. He did not see Hansford, the decedent, on the track at any time, did not see him struck by the engine, and didn't know he was killed until he was told about it some time after. He saw the section foreman and some of his men get off the track, and says he did not see anybody get on the track after the section foreman got off. This witness says: "I looked down the track as the section gang got off the track, and I never looked any more after that until the engine came along right up the side of me. . . . I saw the section boss get off just before the train passed by—just a half a minute before, not that long, I expect—just a few seconds. I don't know whether Mr. Hansford was on the track when the

section foreman got off or not. If he had got on there and stayed there I think I would have seen him. I don't know whether he was on or not." It is clear that this witness does not undertake to testify to the positive fact that Hansford was not standing on the track, or a knowledge of that fact. It was about dark and he was one hundred yards away, and he says that he did not look back down the track any more after the section foreman got off; that he thinks he would have seen decedent if he had got on the track and stayed there, but as a conclusion of his whole statement, the witness says he does not know whether Hansford was on the track or not. We do not think the testimony of this witness raises any conflict in the evidence as to the fact that the decedent at the time of the accident was lingering upon the track or in dangerous proximity, and was not exercising his legal right of an immediate crossing. The statement by the witness that he "thinks he would have seen the decedent if he had gotten on the track and stayed there," was at most but an expression of opinion, for he says he did not look back after the section foreman got off the track, and is not the equivalent of an affirmative statement of the fact that witness would have seen him if he had gotten on the track and stayed there. Moreover, it clearly appears that even in the exercise of the legal right of immediate crossing, ³⁶⁵ that if he, the decedent, had stopped to look and listen, as it was his duty to do, there was nothing to prevent his seeing the approaching locomotive and to have saved himself from the injury. If he did not stop and look and listen, or if he did and then attempted to cross immediately in front of an approaching locomotive, in either case he was guilty of negligence: *Central of Georgia Ry. Co. v. Foshee*, 125 Ala. 199, 27 South. 1006.

We decline to consider the assignments of error as to the action of the court upon demurrers to the complaint, for the reason that the record shows no judgment by the court upon these demurrers. What is stated in the record shows nothing more than a mere memorandum or recital by the clerk, and not a consideration and adjudging by the court necessary to constitute a judgment. The rulings of the court on the admission of evidence raised by assignments of error numbered 2, 3, 4, 7, 9, 10, 11, and 13 are free from fault as the testimony tended to prove the allegations of the complaint.

Whether or not many persons worked at the furnaces, and crossed the track at the point where Hansford was killed, the time of the crossing, whether there was a headlight burning

on the engine, or the bell was rung or whistle was blown at the time of the injury, whether the witnesses had the opportunity of seeing and hearing the facts stated, were pertinent to the inquiry: *Louisville etc. R. R. Co. v. Orr*, 121 Ala. 489, 26 South. 35; *Memphis etc. R. R. Co. v. Martin*, 117 Ala. 367, 23 South. 231.

A witness may testify to the absence of a thing or the non-appearance of an event, if it is shown he was in a position to see and hear the thing inquired about: *Tesney v. State*, 77 Ala. 33; *McVay v. State*, 100 Ala. 110, 14 South. 862; *Alabama etc. R. R. Co. v. Linn*, 103 Ala. 134, 15 South. 508.

The assignments of error numbered 5, 8, and 12 are based on objections to testimony calling for the custom of defendant with reference to lighting the headlight of the engine. This was immaterial, the question being the carrying of a headlight burning on the particular occasion.

The sixth assignment is based upon the admission of evidence against defendant's objection tending to show ³⁶⁶ that the engine in question had no pilot or cowcatcher. No negligence charged in the complaint involved this inquiry; it was immaterial under the issues, and we think calculated to prejudice the minds of the jury, and its admission against objection was error.

What we have said with reference to the issues and the evidence relevant to such issues is sufficient to dispose of other assignments of error based on exceptions to parts of the oral charge, as well as to refused written charges requested by the defendant, without a more particular discussion of those exceptions.

For the errors indicated in the foregoing opinion the judgment of the court must be reversed and the cause remanded.

RAILROADS.—IF A PERSON CROSSING A RAILWAY TRACK could, by looking, have seen an approaching train in time to escape, it will be presumed, in case he is injured by a collision, either that he did not look, or, if he did look, that he did not heed what he saw: *Pittsburgh etc. R. R. Co. v. Frazee*, 150 Ind. 576, 65 Am. St. Rep. 377, 50 N. E. 576. His failure to look and listen is an omission of ordinary care, which will prevent a recovery for injuries sustained: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93, 8 Am. St. Rep. 304, 31 N. W. 147. The fact, however, that a trespasser on a railway track is guilty of contributory negligence does not relieve the railroad company from liability for injury to him if its employes neglect to use reasonable care for his safety: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692; *Purcell v. Chicago etc. Ry. Co.*, 100 Iowa, 629, 77 Am. St. Rep. 557, 80 N. W. 682.

BOWIE v. BIRMINGHAM RAILWAY AND ELECTRIC CO.

[125 Ala. 897, 27 South. 1016.]

CARRIERS — STREET RAILWAYS — SEPARATION OF WHITE AND BLACK PASSENGERS.—A regulation of a street-car company requiring white passengers to occupy seats in one portion of a car operated by it and negro passengers another is reasonable. It is immaterial that the company operates but one car, and that such car is without means to separate the seats set apart for the different classes of passengers.

CARRIERS—SEPARATION OF PASSENGERS.—A public carrier may, in the exercise of his private right of property, and in the due performance of his public duty, separate passengers on account of their color or of any other well-defined characterization.

CARRIERS—SEPARATION OF PASSENGERS—COLOR AS BASIS FOR CLASSIFICATION.—Common carriers may make color a basis of classification, and require their white and colored passengers to occupy separate seats on different parts of the same car when like accommodations are provided by both, and when such classification, and its violation by a passenger are shown, the reasonableness of such regulation is a question of law for the court.

CARRIERS—EXPULSION FROM CAR—EVIDENCE.—In an action by a passenger to recover for injury received in being expelled from a car by the alleged joint action of the conductor and motorman, their joint act in the expulsion of such passenger must be shown to authorize a recovery.

H. K. White, for the appellant.

Walker, Porter & Walker, for the appellee.

404 **TYSON, J.** There are two questions presented for consideration by the record in this case. The first involves 405 the reasonableness of a rule or regulation of the defendant requiring white passengers to occupy seats in one portion of the cars operated by it on a certain line of its road, and negroes to occupy seats in the other portion. The car upon which the plaintiff was a passenger when the regulation under consideration was enforced against her was an open car, the seats for passengers extending across the entire width, separated by aisles; so that passengers boarding the car did so by first stepping from the ground upon a running-board, which ran the full length of it upon either side, and from this running-board into the aisle facing the seats.

The evidence is undisputed that the plaintiff was a negro woman, and declined to occupy a vacant seat in that portion of the car set apart for negroes, but insisted upon sitting in a seat in that portion assigned by the conductor to white people. It was also without dispute that a rule or regulation had been

enforced on this line ever since cars had been operated over it, to the effect that negro passengers should occupy the seats in the front end of the car and white passengers should occupy the seats in the rear end. That this rule was generally known and conformed to by both white and colored passengers. It was also generally known that the conductor of the car required passengers to conform to this regulation. That six or eight months before this occurrence the plaintiff was ejected from one of the cars for refusing to comply with this rule. This rule or regulation was promulgated by the manager of the defendant's company by being posted and published in a bulletin order directing and requiring conductors on this line of road operated by defendant to observe and enforce it, and was in force at the time the injury to the plaintiff, here complained of, was suffered. The dividing line between the seats to be occupied by white and negro passengers was not fixed by the rule, but was left to the conductor to fix and enforce, as, in his judgment, the circumstances and number of passengers of each race might require. The seats in all parts of the car were in all respects alike.

The question here presented was ably considered in ⁴⁰⁶ an opinion delivered by Justice Agnew of the supreme court of Pennsylvania in the case of *West Chester etc. R. R. Co. v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 744, from which we quote at length as the reasons he gives for sustaining the reasonableness of the regulation are so forcibly stated, and the status of the two races with reference to each other, as stated by him to exist in Pennsylvania in 1867, is the status of the two in Alabama today. The facts of that case were these: "Mary F. Miles, a colored woman, the plaintiff, got into the car of the defendant at Philadelphia to go to Oxford and took a seat at or near the middle of it. A rule of the road required the conductor to make colored persons sit at one end of the car. He got a seat for her at the place fixed by the rule and asked her to take it. She declined positively and persistently to do it. The conductor told her of the rule, requested her to take the other seat, warned her that he must require her to leave the car if she refused, and at last put her out. The simple question is, whether a public carrier may, in the exercise of his private right of property, and in the due performance of his public duty, separate passengers by any other well-defined characterization than that of sex. The ladies' car is known upon every well-regulated railroad,

implies no loss of equal right on the part of the excluded sex, and its propriety is doubted by none.

"This question must be decided upon reasonable grounds. If there be no clear and reasonable difference to base it upon, separation cannot be justified by mere prejudice. Nor is merit a test. The negro may be proud of his service in the field as a defender of his country. But it was not thought indefensible to separate even white soldiers from other passengers. There was a clear and well-founded difference between the civil and military character, and the separation of soldiers from citizens implied no want of equality, but a sound regulation of the right of transit.

"The right of the carrier to separate his passengers is founded upon two grounds—his right of private property in the means of conveyance, and the public interest. ⁴⁰⁷ The private means he uses belong wholly to himself, and imply the right of control for the protection of his own interest, as well as the performance of his public duty. He may use his property, therefore, in a reasonable manner. It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting. This is a proper use of the right of private property, because it tends to protect the interests of the carrier as well as the interests of those he carries. If the ground of regulation be reasonable, courts of justice cannot interfere with his right of property. The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well-regulated separation of passengers. An analogy and an illustration are found in the case of an inn-keeper, who, if he have room, is bound to entertain proper guests, and so a carrier is bound to receive passengers. But a guest at an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin or a berth at will or refuse to obey the reasonable orders of the captain of a vessel. But, on the other hand, who would maintain that it is a reasonable regulation, either of an inn or a vessel, to compel the passengers, black and white, to room and bed together? If a right of private property confers no right of control, who shall decide a contest between passengers for seats or berths? Courts of justice may interpose to compel those who perform a business

concerning the public, by the use of private means, to fulfill their duty to the public—but not a whit beyond.

“The public also has an interest in the proper regulation of public conveyances for the preservation of the public peace. A railroad company has the right and is bound to make reasonable regulations to preserve order in their cars. It is the duty of the conductor to repress tumults as far as he reasonably can, and he may, on extraordinary occasions, stop his train and eject the ⁴⁰⁸ unruly and tumultuous. He cannot interfere in the quarrels of others at will merely. In order to preserve and enforce his authority as the servant of the company, it must have a power to establish proper regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their separation than it is to quell them. The danger of the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. . . . These views are sustained by high authority. Judge Story, in his *Law of Bailments*, stating the duty of passengers ‘to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of the other passengers, as well as for their own proper interests,’ says: ‘The importance of the doctrine is felt more strikingly in cases of steamboats and railroad cars’: *Story on Bailments*, sec. 591a; see, also, sec. 476a; *Angell on Carriers*, sec. 528; 1 *American Railway Cases*, 393, 394.

“The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this state, resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of in-

timinate social intermixture is to amalgamation, contrary to the law of races. The ⁴⁰⁹ separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is, therefore, an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts. . . .

“Never has there been an intermixture of the two races, socially, religiously, civilly, or politically. By uninterrupted usage the blacks live apart, visit and entertain among themselves, occupy separate places of worship and amusement, and fill no civil or political stations, not even sitting to decide their own causes. In fact, there is not an institution of the state in which they have mingled indiscriminately with the whites. Even the common school law provides for separate schools when their numbers are adequate. In the military service, also, they were not intermixed with the white soldiers, but were separated into companies and regiments of color, and this not by way of disparagement, but from motives of wisdom and prudence, ⁴¹⁰ to avoid the antagonism of variant and immiscible races. Law and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away. We cannot say there was no difference in fact, when the law and the voice of the people had said there was. The laws of the state are founded on its constitution, statutes, institutions, and general customs.

It is to these sources judges must resort to discover them. If they abandon these guides they pronounce their own opinions, not the laws of those whose officers they are. Following these guides, we are compelled to declare that, at the time of the alleged injury, there was that natural, legal, and customary difference between the white and black races in this state which made their separation as passengers in a public conveyance the subject of a sound regulation to secure order, promote comfort, preserve the peace, and maintain the rights of both carriers and passengers."

In *Hall v. McCuir*, 95 U. S. 485, which was a suit by a negro woman against the owner of a steamboat for refusing her accommodations, on account of her color, in the cabin specially set apart for white persons, the court, after citing approvingly the case above quoted from, said: "Where the passenger embarks without making any special contract, and without knowledge as to what accommodations will be afforded, the law implies a contract which obliges the carrier to furnish suitable accommodations, according to the room at his disposal; but the passenger in such a case is not entitled to any particular apartments or special accommodations. Substantial equality of right is the law of the state and of the United States; but equality does not mean identity, as, in the nature of things, identity in the accommodation afforded to passengers, whether colored or white, is impossible, unless our commercial marine shall undergo an entire change. Adult male passengers are never allowed a passage in the ladies' cabin, nor can all be accommodated, if the company is large, in the staterooms. Passengers are entitled to proper diet and lodging; but the laws of the United States do not require the master of a steamer to put persons in the same ⁴¹¹ apartment who would be repulsive or disagreeable to each other.

"Steamers carrying passengers as a material part of their employment are common carriers, and as such enjoy the rights and are subject to the duties and obligations of such carriers; but there was and is not any law of Congress which forbids such a carrier from providing separate apartments for its passengers. What the passenger has a right to require is such accommodation as he has contracted for, or, in the absence of any special contract, such suitable accommodations as the room and means at the disposal of the carrier enable him to supply; and in locating his passengers in apartments and at their meals, it is not only the right of the master, but his duty, to exercise such reasonable

discretion and control as will promote, as far as practicable, the comfort and convenience of his whole company."

Boothe on Street Railways, section 325, says: "The doctrine that, in the absence of statutory inhibition, a common carrier may lawfully make color a basis of classification, and require its white and colored passengers to occupy separate cars or different parts of the same car when like accommodations are provided, has received the support of many of the courts, both state and federal, and is the rule which has been followed in the greater number of decisions heretofore rendered": See, also, cases cited by Boothe on Street Railways in note 3, p. 443, note 1, p. 444; *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. Rep. 1138.

The other question presented is whether the reasonableness of the rule is a mixed question of law and fact, or merely a question of law for the court.

The principle upon which the reasonableness of the rule is sustained in this case is that the carrier's right of property in the means of the conveyance and the public interest are best subserved by a separation of negro and white passengers; that their separation tends to secure order, promote comfort, preserve the peace, and maintain the rights of both carrier and passengers. When the rule is established by the evidence and its ⁴¹² violation shown by a passenger undisputedly, it is a question of law for the court. It is of no consequence that the defendant company operated other lines and no such regulation is enforced by it upon them. The fact that it does not exercise the right to establish and enforce such a regulation upon its other lines affords no reason for saying that the regulation established and enforced in this case is unreasonable, or that the company has no right to establish such a rule. On this phase of the case, the court could have instructed the jury affirmatively, if requested in writing, leaving for consideration by the jury, as it did, the single question whether the conductor used more force than was necessary, in enforcing the rule, under the circumstances.

Charges 1, 3, 4, 8, 9, and 10, given at the request of the defendant, were in conformity with the principles here announced by us and, therefore, there was no error in the giving of them.

Charges 5 and 7 are admitted by appellant to involve no error.

Charge 6 is insisted to be erroneous for three reasons: 1. It directs a verdict for the defendant without referring to the jury the amount of force used by the conductor in ejecting the

plaintiff; 2. It directs a verdict for defendant without referring to the jury whether there was a vacant seat in the car for plaintiff to take; and 3. It withdraws from the jury the question of the reasonableness of the defendant's regulation. A sufficient answer to these criticisms of the charge is to call attention to the averments of the complaint, which disclosed that the alleged assault or ejection from the car was committed jointly by the conductor and motorman. The plaintiff must prove her cause of action in manner and form as alleged.

The charges refused to the plaintiff are not insisted upon in argument, and we will not consider them, except to say that they contravene the principles here declared, and there was no error in their refusal.

The judgment is affirmed.

CARRIER—CLASSIFICATION OF PASSENGERS.—A carrier's regulation as to separation of black from white passengers is sound and reasonable: *West Chester R. R. Co. v. Miles*, 55 Pa. St. 200, 93 Am. Dec. 741. See, further, the note to *Commonwealth v. Powers*, 41 Am. Dec. 482, 483. So is a regulation whereby a car is set aside for ladies, or gentlemen accompanied by ladies: *Memphis R. R. Co. v. Benson*, 85 Tenn. 627, 4 Am. St. Rep. 776, 4 S. W. 5.

RAILWAY—RULES OF.—THE REASONABLENESS of rules prescribed by railroad companies is a question of law for the court: *South Florida R. R. Co. v. Rhodes*, 25 Fla. 40, 23 Am. St. Rep. 506, 5 South. 633.

TURRENTINE v. BLACKWOOD.

[125 Ala. 436, 28 South. 95.]

JURISDICTION — CONFLICT — STATE AND NATIONAL COURTS.—If a national court has acquired jurisdiction of the estate of a bankrupt, and the trustee appointed by it has, in obedience to its orders, taken possession of the bankrupt's property, and holds it subject to the order of such court, a third person, claiming to own part of such property, cannot maintain an action in the state court against the trustee to recover such part, and the trustee may, in such action, prove that he holds the property sued for as trustee, and not otherwise.

JURISDICTION — CONFLICT BETWEEN STATE AND NATIONAL COURTS.—A national court, having acquired complete jurisdiction of the assets of a bankrupt and his creditors, may fine and imprison any of them for proceeding in the state court to interfere with such assets without its permission.

JURISDICTION — STATE AND NATIONAL COURTS — BANKRUPTCY.—If a state and a national court have concurrent jurisdiction over the property of a bankrupt, the court which first

takes cognizance of and acquires jurisdiction over the case has the right to retain it to the exclusion of the other. If an estate in bankruptcy is being administered by the national court, no other court can interfere and wrest from it the possession and jurisdiction first obtained, or any part thereof.

Burnett & Culli, for the appellant.

J. E. Blackwood and Hood & Murphree, for the appellee.

⁴⁴⁰ HARALSON, J. This suit was brought in the state court by the plaintiff, Turrentine, against the appellee, Blackwood, defendant, to recover from him personal chattels in specie. Before the suit was brought, the defendant had been duly elected and qualified as trustee in bankruptcy of one Ware, who had filed his petition to be adjudged a bankrupt, in the district court of the United States for the southern division of the Northern district of Alabama. That court, on the 1st of November, 1898, made the following order: "In the matter of J. Walter Ware in bankruptcy.—In this matter, the bond of J. E. Blackwood, trustee, having been approved, it is ordered by the court that the property mentioned in the petition in this court be turned over to the said J. E. Blackwood as such trustee." It was shown that the property sued for, together with a stock of goods, was at the time in the hands of the sheriff of Etowah county in this state, kept in a storeroom in Gadsden in said county, where the bankrupt, Ware, had carried on a general merchandise business; that under said order the defendant, as such trustee, went into the possession of said goods and still holds the same, delivered to him by said sheriff.

These and other facts proper to show the rightful possession of said property by the defendant as trustee, and that the jurisdiction of said United States court to administer said bankrupt's estate had attached, and, further, that its jurisdiction was exclusive for that purpose, were pleaded to the jurisdiction of the state court to entertain this suit to take the property out of the possession of defendant as trustee and the custody of the bankrupt court, proceeding to administer the same. The case was tried upon the amended plea No. 1 of the defendant. A demurrer was interposed to it, on several grounds, which was properly overruled by the court.

It must be conceded that the bankruptcy court has no jurisdiction over a state court, but it has complete jurisdiction of the assets of the bankrupt and his creditors, ⁴⁴¹ and may fine and imprison any of them for proceeding in the state court to in-

terfere with the assets of the bankrupt, without the permission of the district court: *Brandenburg on Bankruptcy*, 100, and authorities cited. The same author states that: "The jurisdiction of a state court does not extend to the administration of the assets of an insolvent bankrupt, but the property should be surrendered into the court of bankruptcy to be there administered upon, and any creditor who holds a claim against the estate of the bankrupt, which might be proved in bankruptcy, whether the debt is secured by lien or not, can only enforce such debt in the state court upon permission of the district court": *Brandenburg on Bankruptcy*, 101; *Collier on Bankruptcy*, 21. See, also, *High on Receivers*, sec. 254; *In re Anderson*, 23 Fed. 482, 496.

Conceding that the state and federal courts have concurrent jurisdiction in certain instances over the bankrupt's property, another principle is universally acknowledged, "that when two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other; that if a trust estate is being administered by a court of competent jurisdiction, or when property is in gremio legis of a court of rightful jurisdiction, no other court can interfere and wrest from it the possession and jurisdiction first obtained": *Gay v. Briarfield etc. Co.*, 94 Ala. 308, 33 Am. St. Rep. 122, 11 South. 353; *Gould v. Hays*, 19 Ala. 438; 12 Am. & Eng. Ency. of Law, 292. The supreme court of the United States, referring to the same subject, say: "These rules have their foundation, not merely in comity, but on necessity. For if one court may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one if they dare proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice": *Peck v. Jenness*, 7 How. 624, 625; *Case Plow Works v. Finks*, 81 Fed. 529, 531; *Southern Granite Co. v. Wadsworth*, 115 Ala. 570, 22 South. 157. The ⁴⁴² last case cited was one similar in its essential features to the one in hand, where the question here presented was fully considered and decided adversely to the contention of the plaintiff.

There was no error in allowing the defendant to answer that he presented the order of the district court to the sheriff and as trustee acquired the possession of the goods from him, and held the property as trustee. While the suit was against him individ-

ually, he had the right to show that he held as trustee, and not otherwise. Furthermore, there was no pretense that he acquired and held possession of the property otherwise than as trustee: *Southern Granite Co. v. Wadsworth*, 115 Ala. 570, 22 South. 157. Nor was there error in refusing to allow the proof that, at the time the trustee took possession, the plaintiff notified him that the property sued for belonged to him, and that it was his property at the time the bankruptcy court ordered the trustee to take charge thereof.

The cause was tried without the intervention of a jury. The court, finding the issues in favor of the defendant, abated the writ of detinue, in which there was no error.

Affirmed.

IN CASE OF A CONFLICT OF JURISDICTION between two courts having concurrent jurisdiction, the one which first acquires cognizance of a controversy is entitled to retain it until the end of the litigation: *Spiller v. Wells*, 96 Va. 598, 70 Am. St. Rep. 878, 32 S. E. 46; *Reisner v. Gulf etc. Ry. Co.*, 89 Tex. 656, 59 Am. St. Rep. 84, 36 S. W. 53. This principle obtains in cases of conflict between the state and federal courts: See the monographic note to *Plume etc. Co. v. Caldwell*, 29 Am. St. Rep. 314.

JOHNSON v. NATIONAL BUILDING AND LOAN ASSOCIATION.

[125 Ala. 465, 28 South. 2.]

BUILDING AND LOAN ASSOCIATIONS—POWER TO ISSUE PAID-UP STOCK.—A building and loan association may, in the absence of express legislative authority, exercise the power of issuing prepaid or paid-up stock. Such right comes within the legitimate scope of the business of such associations.

BUILDING AND LOAN ASSOCIATIONS—USURY.—If a contract for a loan from a building and loan association is such as the association is authorized to make under the law creating it, the contract cannot be deemed void for usury under another statute regulating the rate of interest generally.

CORPORATIONS—STOCKHOLDERS—REDRESS OF CORPORATE WRONGS.—If injury results to a shareholder in a building and loan association or other corporation, by an abuse of corporate power, the wrong must be redressed within the corporation if possible. A stockholder cannot maintain suit against the corporation to redress a corporate wrong until he has done all in his power to obtain, within such corporation, redress for the wrong complained of, or has shown by his bill a sufficient reason for his failure to do so.

The present bill is wanting in the necessary averments as a bill by a stockholder against the corporation for the redress of corporate wrongs.

Moreover, the plan for the issuance of paid-up stock is provided for in the by-laws of the respondent company, and, so far as the bill shows, the very conditions out of which the supposed inequality arises between the two classes of stock existed when the complainant subscribed for his stock and became a member of the association. For aught that can be known from the bill, the six thousand shares of paid-up stock mentioned had already been issued by the association when the complainant subscribed for his stock, and even if it had not been, he had notice that the issuance of paid-up stock, and upon the plan that the six thousand shares were actually issued, was provided for and authorized by the by-laws. The complainant with this knowledge became a member of the association as an installment stockholder, ⁴⁸² prompted, as he says, by a desire to secure a loan of ten thousand dollars of the funds of the association, and having secured the loan and had the use of the same for the loan period stipulated in the mortgage, he now seeks through a court of equity to evade the payment of his debt by having his contract of membership in the association annulled on account of alleged corporate wrongs, of which he had full knowledge when he became a member and obtained the loan. Independent of the consideration of other questions as to the right of the complainant as a stockholder to maintain a suit against the corporation to redress corporate wrongs upon a proper bill filed, these facts do not commend the complainant to a court of equity as one who is entitled to the relief sought by the present bill.

As to the charge of fraud, it is not shown by the bill in what the alleged false and fraudulent representations consisted, further than it is averred, "that the true consideration of said mortgage was, that complainant was to pay the corporation monthly the sum of one hundred and ninety dollars per month for sixty-five months, and at the outside limit he was to pay only seventy-two months." This evidently relates to the matter of the maturing of the stock, a matter of opinion or judgment, and so far as is shown by the bill, equally open to both parties. In *Montgomery etc. Ry. Co. v. Matthews*, 77 Ala. 364, 54 Am. Rep. 60, it was said by this court, speaking through Stone, C. J.: "An opinion expressed, even if not realized, cannot, without more, become a fraudulent representation. If, however, such opinion is falsely expressed, with intent to deceive, and does deceive, this

constitutes such opinion or representation a false statement of fact, and vitiates a contract thereby procured, unless the representation relates to a matter equally open to both parties. This could not deceive": *Lake v. Security Loan Assn.*, 72 Ala. 209; *Bradfield v. Elyton Land Co.*, 93 Ala. 527, 8 South. 383; *Birmingham Warehouse etc. Co. v. Elyton Land Co.*, 93 Ala. 549, 9 South. 235; *Thompson on Building and Loan Associations*, 178, note.

Upon the question of an accounting, as we have stated above, there is no dispute as to the amount of the loan nor as to the payments made by the complainant either ⁴⁸³ in his character as borrower or as a stockholder; and it may be added here that there was never any demand and refusal for an accounting, so far as the bill shows. We do not think the complainant shows himself entitled to maintain the bill for an accounting under its averments: 1 *Ency. of Pl. & Pr.* 98; *Security Assn. v. Lake*, 69 Ala. 456, 465; *Hudson v. Vaughan*, 57 Ala. 609; *Avery v. Ware*, 58 Ala. 475; *Tecumseh Iron Co. v. Camp*, 93 Ala. 572, 9 South. 343.

Our conclusion is that the bill is without equity, and the court below committed no error in the decree sustaining the demurrer to the bill, and that ruling must be affirmed. On the cross-appeal from the decree overruling the motion to dismiss the bill for want of equity and to dissolve the injunction, we are of opinion the court erred in overruling the motion and refusing to dissolve the injunction, and this action of the court must be reversed. That the complainant may have an opportunity of meeting the ruling here made in holding the bill in its present shape to be without equity, by amending the same, the cause will be remanded for such opportunity.

STOCKHOLDER'S REDRESS OF CORPORATE WRONGS.—To entitle a stockholder in a corporation to maintain an action in his own name to redress corporate wrongs, he must show by his complaint that he has sought redress within the corporation, or a satisfactory excuse therefor: *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140, 21 South. 315.

BUILDING AND LOAN ASSOCIATION—USURY.—Whether the exactions of building and loan associations in excess of the legal rate of interest are usurious is considered in the monographic notes to *Bank of Newport v. Cook*, 46 Am. St. Rep. 200, 201; *Robertson v. American Homestead Assn.*, 69 Am. Dec. 160-162. See, also, *Iowa Sav. etc. Assn. v. Heldt*, 107 Iowa, 297, 70 Am. St. Rep. 197, 77 N. W. 1050; *Pollock v. Carolina etc. Loan Assn.*, 51 S. C. 420, 64 Am. St. Rep. 683, 29 S. E. 77.

COOK v. COOK.

[125 Ala. 583, 27 South. 918.]

HUSBAND AND WIFE—EJECTMENT BY WIFE.—A wife may maintain ejectment against her husband to recover the possession of lands constituting her separate estate. It is immaterial that such lands were at one time occupied by him and her and their children as a homestead, or that the husband and children still reside thereon, or that he at the time of trial, and at all times, was willing for the wife to return to the homestead and occupy it jointly with him.

HUSBAND AND WIFE—EJECTMENT BY WIFE.—A wife, having separated from her husband and having left her separate estate in his possession, is entitled to recover it from him as if he were a stranger.

Ejectment by a wife against her husband to recover possession of her separate estate. Judgment for the plaintiff, and the defendant appealed.

J. H. Branch, for the appellant.

T. Betts and W. F. Esslinger, for the appellee.

584 McCLELLAN, C. J. That a wife must sue alone for the recovery of her separate property is expressly provided by statute: Code, sec. 2527. That she may sue her husband for the recovery of personal property belonging to her has been expressly decided: Bruce v. Bruce, 95 Ala. 563, 11 South. 197. The right to sue her husband to recover from him possession of her realty rests upon the same statutory provision and the same principles declared in the case cited as to her personalty, and can no more be denied in respect of one class of property than in respect 385 of the other. Nor is it of consequence that the land of which recovery is sought was at one time occupied by the husband and wife with their children as a homestead, nor that the husband and children still reside thereon, nor that the defendant at the time of trial is willing and all along has been for the wife to return to this homestead and occupy it jointly with him. He has no right to compel her to let him into joint possession or occupation of any of her land, nor any right to exclude her from the possession and occupation altogether, unless she assents to joint possession and occupation with him. There is no law to compel a wife to live with her husband on her land or on his. There is no legal prohibition upon her separating from him and living apart. And having separated from him and left her

home in his possession, she is entitled to recover it from him as if he were a stranger. To hold otherwise would be to give the husband rights and estates in the wife's lands which our statutes not only do not provide for, but expressly provide against. This is the view taken by the trial court. Upon it the affirmative charge was properly given for the plaintiff, and the judgment must be affirmed.

A WIFE MAY MAINTAIN EJECTMENT against her husband to recover possession of her separate estate: *Crater v. Crater*, 118 Ind. 521, 10 Am. St. Rep. 161, 21 N. E. 290. Compare *Frankel v. Frankel*, 173 Mass. 214, 73 Am. St. Rep. 266, and note 278, 53 N. E. 398.

ALABAMA LUMBER COMPANY v. KEEL.

[125 Ala. 603, 28 South. 204.]

WATERCOURSES—OBSTRUCTION OF—DAMAGES.—If the owner of timber floats such masses thereof into a boom as to create a jam in such boom and up the river along a riparian owner's land, covering the surface of the stream, rising above the surface thereof several feet, and extending much below, thereby raising the water and throwing it out upon the land of the riparian owner, to his damage, or whether raised higher than it would have been in the absence of the jam, the current of the river by reason of the timbers was diverted from the channel and made to run across such riparian owner's land, to his great damage, the owner of the timber is liable to the land owner, though he had a right to construct and use the boom, though it was properly constructed, and though all care and diligence were used to prevent the formation of the jam when the timbers came into the boom, and to relieve the jam after its formation.

WATERCOURSES—OBSTRUCTION OF—DAMAGES.—In an action by a riparian owner to recover for injury to his land resulting from defendant's floating too great a quantity of timber down the stream, thereby causing a jam, it is for the jury to decide whether the amount of timber shown to have been thus floated was an unreasonable use of the stream.

WATERCOURSES—OBSTRUCTION OF.—In an action by a riparian owner to recover for injury to his land resulting from defendant's floating too great a quantity of timber down the stream, thereby causing a jam, although it is shown that one of the causes which led to the injury complained of was an unusual flood, yet if it is shown that if it had not been for the wrongful use of the stream in floating the timbers the damage to the land would not have occurred, the land owner is entitled to recover.

WATERCOURSES — OBSTRUCTION OF — EFFECT ON OTHER LANDS.—In an action by a riparian owner to recover for injury to his land by reason of an overflow caused by defendant's floating too great a quantity of timber down the stream,

thereby causing a jam below the riparian owner's land, evidence as to whether other tracts of land belonging to other people and located on the same stream above and below such jam were overflowed is irrelevant and inadmissible.

Martin & Bouldin, for the appellant.

J. E. Brown, for the appellee.

608 McCLELLAN, C. J. If the facts are as deposed to by the plaintiff and his witnesses—if the defendant floated such masses of timber into the boom as to create a jam in the boom and up the river along plaintiff's land, covering the surface of the stream and rising above the surface for several feet and, of course, in consequence extending much below the surface—even, it is inferable, to the bed of the stream in places—and thereby the water was raised and thrown out upon plaintiff's land to his damage, or, whether raised or not higher than it would have been in the absence of the jam, if the current by reason of the timbers was diverted from the channel and made to run across plaintiff's land, carrying away his fences and cutting away the soil of his land, the defendants are liable to damages to him, though they had a right to construct and use the cross-boom, though it was properly constructed, and though they used all care and diligence to prevent the formation of the jam as the timbers came into the boom, and to relieve the jam after it had been formed. On this state of case their wrong and negligence consists in floating logs and timbers down the river to the boom in such numbers and masses as that the jam and consequent damming up of the stream so as to raise the water and throw it upon plaintiff's land or to divert its current across the same was inevitable; and their unavailing efforts to prevent the jam and to relieve it serve but to accentuate or make clearer their fault in having thus overtaxed the capacity of the stream and their own resources: 4 Am. & Eng. Ency. of Law, 711 et seq.; Gould on Waters, sec. 103; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Cotton v. Mississippi etc. River Boom Co., 19 Minn. 497; White River Log etc. Co. v. Nelson, 45 Mich. 578, 8 N. W. 587, 909; Anderson v. Thunder Bay River Boom Co., 61 Mich. 489, 28 N. W. 518; Haines v. Welch, 14 Or. 319, 12 Pac. 502; Hackstack v. Kershena Imp. Co., 66 Wis. 439, 29 N. W. 240; McKenzie v. Mississippi etc. Boom Co., 29 Minn. 288, 13 N. W. 123; Weaver v. Mississippi etc. Boom Co., 28 Minn. 534, 11 N. W. 114. This is the view taken by the trial court
609 as indicated in its rulings upon charges requested by the

defendants. Of the instructions refused to them, all but three would have required a verdict for defendants, though the jury might be satisfied that they were at fault in unreasonably over-taxing the stream in the floating of timbers and that such fault caused the injuries complained of. Of the rest, charge 1 was the general affirmative charge and was, of course, properly refused. The injuries to plaintiff might in a sense have been caused by the extraordinary flood stage of the river, and yet the wrong of defendants might have so coalesced with that cause as to render them liable. Charge 3 was therefore misleading and properly refused. Charge 6 refused to defendants is covered by the first given charge at their instance. It was for the jury to say whether "the amount of timber floated and boomed in this case was an unreasonable use of the stream." Charge 7 would have taken this issue from them.

The court was right in declining to go into inquiries as to whether various other tracts of land belonging to divers persons, and located some above the jam and others below the boom, but none having the same relation to either as the land of the plaintiff, "were washed, and if so, the character and extent of the wash." This line of inquiry would have opened up an unlimited number of issues, collateral to the issue in this case, and the solution of which could have shed only a very dim and uncertain and confusing ray of light on the question before the jury.

Affirmed.

ONE USING A STREAM FOR FLOATING LOGS is not answerable to a riparian proprietor for the jamming of logs together so as to form a gorge, retarding the flow of water, and submerging the plaintiff's lands, unless the defendant is guilty of want of ordinary care and prudence, and the damage is due to such lack of care: *Hopkins v. Butte etc. Commercial Co.*, 13 Mont. 223, 40 Am. St. Rep. 438, 33 Pac. 817. See, also, *Coyne v. Mississippi etc. Boom Co.*, 72 Minn. 533, 71 Am. St. Rep. 508, 75 N. W. 748. But the log owner has no right to so deal with his logs, by the forming of jams or otherwise, as to cause the water to overflow the adjoining land more than it would were the logs left to themselves and allowed to float down naturally without artificial interference: *Witheral v. Muskegon Boom Co.*, 68 Mich. 48, 13 Am. St. Rep. 325, 35 N. W. 758.

FIRST NATIONAL BANK v. ELLIOTT.

[125 Ala. 646, 27 South. 7.]

JUDICIAL SALES—EXTINGUISHMENT OF LIENS.—A sale of land under execution or by foreclosure of a mortgage extinguishes the lien thereof, whether the entire debt secured is satisfied or not.

MORTGAGES—REDEMPTION BY JUDGMENT CREDITOR EXTINGUISHES LIEN.—As against a judgment creditor offering to redeem from a mortgagee who has purchased at his own foreclosure sale, the unpaid balance of the mortgage debt does not, within the meaning of the statute, constitute a "lawful charge" which such creditor is required to satisfy as a condition precedent to his right to redeem.

MORTGAGES—FORECLOSURE—REDEMPTION—PARTIES.—If, in an action to redeem from a foreclosure sale, the purchaser being the mortgagee, who is a married woman, it is alleged that such purchaser, together with her husband, jointly executed a contract of sale of the land to a subpurchaser, the husband is, if not a necessary party, not an improper party, if the bill prays that the equities of all the parties be adjusted, and that upon redemption the husband be compelled to join in a deed with his wife.

A. P. Agee, for the appellant.

Blackwell & Keith, for the appellee.

649 DOWDELL, J. The present appeal is prosecuted from the decree of the city court sustaining respondent's demurrers to the complainant's bill. The facts pertinent to the question involved, as stated in the bill, are substantially as follows: On the sixteenth day of May, 1890, J. R. Robinson loaned to Algernon Culberson and E. J. Cobb three thousand five hundred dollars for three years, and took as security a mortgage on a lot in the city of Anniston, Alabama, on the corner of Tenth street and Quintard avenue, fronting thirty feet on Tenth street, and running back eighty-five feet, said real estate being a part of lots 5 and 6 in block 16. On October ⁶⁵⁰ 24, 1890, said Robinson transferred this debt and mortgage to May R. Elliott, one of the appellees in this case. Some time prior to the 13th of July, 1893, the Corning Land, Industrial & Trust Company assumed the payment of said debt, the property embraced in said mortgage having been conveyed to it. On that day, desiring an extension of said debt to the 16th of May, 1894, the said Corning Land, Industrial & Trust Company mortgaged to said Elliott a lot adjoining that above described on the west side, fronting twenty-eight feet on Tenth street and running back eighty-five feet. On the 1st of April,

1895, said company, again desiring an extension of said debt, mortgaged to said Elliott a part of lots 7, 8, 9, and 10 in block 16, with the livery-stable thereon. The Corning Land, Industrial & Trust Company having made default in the payment of said debt, and said Elliott, having duly advertised the lands embraced in said several mortgages, sold the same at public auction to the highest bidder for cash on the 7th of April, 1897, and at said sale, said May R. Elliott being authorized, under the terms of the mortgage to bid and purchase at the foreclosure sale, became the purchaser of the property in the first described mortgage for five hundred dollars, in the second mortgage for fifteen dollars, and in the third mortgage for eleven hundred dollars. Since the foreclosure she has sold the property mentioned in said mortgages to A. G. Donahoo for four thousand dollars, one-fifth cash, and the balance in equal installments in one, two, three, and four years, executing to said Donahoo her bonds for title, and said Donahoo has sold the property mentioned in the mortgage first described to A. H. Smith for one thousand dollars, one-fifth cash and the balance in equal installments in one, two, three, and four years, the said Donahoo executing to said Smith his bond for title. On the 8th of October, 1896, appellant, the First National Bank, obtained a judgment against said Corning Land, Industrial & Trust Company for six thousand and eighty dollars and ninety-eight cents and costs nine dollars and twenty cents, upon which execution was issued October 19, 1896, and returned December 7, 1896, "No property found." Under this judgment the appellant has filed the bill in this case, asking to redeem all of said property embraced in all of said mortgages foreclosed and bought in by May R. Elliott as ⁶⁵¹ aforesaid offering to pay the amounts bid for said several lots, with ten per centum interest per annum, and lawful charges, and the cost of permanent improvements, but expressly declining to pay the balance due on the mortgage debt to May R. Elliott after crediting the amounts of said purchases. Appellee filed demurrers to said bill based upon the ground that appellant did not offer to pay the balance of her mortgage debt, which, as she insists, was a lawful charge upon the land.

Thus it will be seen that the question presented by the record for our determination is as to what, within the language of sections 3507-3510 of the code of 1896, constitutes a "lawful charge." While cognate questions have been passed upon and decided by this court, yet the exact question as presented

by the facts in this case has never been decided, and it may be said that up to this time the question is *res integra*.

There is no difference between counsel in this case as to the real issue. That issue is, whether the unsatisfied balance of the mortgage debt is a "lawful charge" against a judgment creditor seeking to redeem from the mortgagee who purchased at his own foreclosure sale. If it is a lawful charge, then this case, as to that proposition, should be affirmed. If it is not, it should be reversed.

Generally, lawful charges, such as the party coming in to redeem must pay, or offer to pay, may be divided into two classes: 1. All liens, legal or equitable, which the purchaser at the foreclosure sale may have upon the premises and for which either at law or in equity he would be entitled to hold them as security; 2. All claims of any kind to which a court of equity would condemn the premises in the hands of the person redeeming after he had acquired the title.

In *Grigg v. Banks*, 59 Ala. 311, it was said by this court: "The word 'charge' is of a very large signification, and in the statute its proper signification is every lien or encumbrance or claim the purchaser may have upon the premises, and for which, at law or in equity, he would be entitled to hold the lands as security and to the satisfaction of which a court of equity would condemn them."

⁶⁵² Again, in *Lehman v. Collins*, 69 Ala. 127, it was said: "Every lien, or encumbrance, or claim for which the purchaser would be entitled to hold the land as security and to which a court of equity would subject them, whoever comes to redeem is bound to satisfy. But it is only liens, legal or equitable, claims capable of enforcement, the creditor coming to redeem can be required to satisfy."

In *Cramer v. Watson*, 73 Ala. 127, the same definition of "lawful charges" is given as quoted above from *Grigg v. Banks*, 59 Ala. 311.

In *Parmer v. Parmer*, 74 Ala. 285, in an opinion by Somerville, J., wherein it was decided that the ordinary debts not covered by the mortgage were not lawful charges against the mortgagor seeking to redeem from the mortgagee, it was said: "Lawful charges embrace only such claims or demands as are in the nature of an encumbrance or lien for which the purchaser would be entitled to hold the land as security": Citing *Lehman v. Collins*, 69 Ala. 127; *Grigg v. Banks*, 59 Ala. 311; *Walker v. Ball*, 39 Ala. 298; *Couthway v. Berghaus*, 25 Ala.

393. Judge Somerville then adds: "It is manifest that if the setoff claimed by the mortgagee before the register had been allowed, the legal effect would have been indirectly to create them liens upon the mortgaged property, in the face of the fact that there was no agreement between the parties to this effect."

In *Gresham v. Ware*, 79 Ala. 192, Clopton, J., in deciding that statutory damages and protest fees on a bill of exchange were "lawful charges," says: "The statutory damages accruing on the protest of a bill of exchange constitute a part of the debt and are recoverable in an action on the bill. It is true the acceptor is not personally liable for them. They are, however, secured by the mortgage so far as respects the property of Robert Ware, equally with the principle and interest, and in ascertaining the amount to be paid by the complainant on redemption and the extent to which his property shall be applied in exoneration of hers, all claims and demands having by the mortgage a valid lien on his property must be taken into the estimate."

⁶⁵³ In *Harris v. Miller*, 71 Ala. 26, in an opinion by Judge Brickell, who also delivered the opinion in the cases of *Grigg v. Banks*, 59 Ala. 311, *Lehman v. Collins*, 69 Ala. 127, and *Cramer v. Watson*, 73 Ala. 127, after defining "lawful charges" in almost the same language as used in *Grigg v. Banks*, 59 Ala. 311, then adds: "The charge may and will vary with different purchasers."

Under subdivision 1, the lien discharged by the purchaser must not only be an existing, valid lien, but such that its satisfaction and removal is necessary to the full and absolute ownership and enjoyment of the property by the purchaser. It makes no difference whether the purchaser be the mortgagee himself or a stranger, such lien or encumbrance, when paid off by the purchaser, constitutes a "lawful charge" within the meaning of the statute. The measure of the amount of the "lawful charge" which the redemptioner is required to pay is not determined by the sum or amount originally secured by the lien, but by the amount actually paid by the purchaser for its discharge and removal. It is to this extent that the purchaser, in a sense, becomes subrogated to the rights of the original lienor, and no further.

It is, therefore, not an unimportant inquiry as to whether, upon the foreclosure of her mortgage by the appellee, Mrs. Elliott, the mortgage lien became thereby extinguished. When

Mrs. Elliott foreclosed her mortgage, buying in the property at the foreclosure sale as she was authorized to do under the mortgage contract, she went into the possession of the property as absolute owner, discharged of all lien which existed under the mortgage before foreclosure: *Cramer v. Watson*, 73 Ala. 127; *Spoor v. Phillips*, 27 Ala. 193.

We think the proposition too well settled to admit of doubt that the sale of land under execution or by foreclosure of a mortgage extinguishes the lien, and this is true, whether the entire debt secured be satisfied or not: *Black on Judgments*, sec. 479; *Curtis v. Cutler*, 76 Fed. 16, 37 L. R. Ann. 737; *Willis v. Miller*, 23 Or. 352, 31 Pac. 827; *Ogle v. Koernor*, 140 Ill. 170, 29 N. E. 563; *Clayton v. Ellis*, 50 Iowa, 590; *Tuttle v. Dewey*, 44 Iowa, 306.

In *Ogle v. Koernor*, 140 Ill. 170, 29 N. E. 563, it was said: "A mortgage, or, as in this case, a deed of trust in the nature of a mortgage, ⁶⁵⁴ vests in the party secured by it a lien upon the mortgaged premises. By virtue of that lien the mortgagee is entitled to have the mortgaged property sold under a decree of foreclosure and the proceeds of the sale applied to the payment of the debt secured. This is the mode prescribed by law for the enforcement of the lien; and when the lien has been once enforced by the sale of the property, it has, as to such property, expended its force and accomplished its purpose, and the property is no longer subject to it. When the redemption is made by the party primarily liable on the mortgage debt, it may be that the same property may be resorted to again for the purpose of subjecting it to an unpaid balance due on the mortgage debt, but it is not because of any right to enforce the mortgage lien against the property the second time, but because of the rule of law which subjects all the property of the debtor to the payment of his debts until they are satisfied in full. But where the redemption is made by a party not liable upon the mortgage debt, the mortgage lien having been exhausted, the mortgaged property cannot be subjected a second time to the satisfaction of the same lien." The principle here laid down is in harmony with the proposition laid down in *Harris v. Miller*, 71 Ala. 26, that the "lawful charge" "may and will vary with different purchasers." It would not for a moment be contended that the unpaid balance of the mortgage debt after foreclosure sale would constitute a "lawful charge" against a creditor offering to redeem from a stranger who purchased at the foreclosure sale.

In *Harris v. Miller*, 71 Ala. 26, which was the case of a mortgagor seeking to redeem from the mortgagee who purchased at the foreclosure sale, it was decided that the unsatisfied balance of the mortgage debt was a "lawful charge" which the mortgagor must pay before his redemption could be effected; but it must not be overlooked that this conclusion was put upon the distinct proposition that the title acquired by the mortgagor upon redemption would at once inure to the benefit of the mortgagee and for that reason, as to the unpaid balance of the mortgage debt, the mortgage would be a valid and ⁶⁵⁵ operative security. It is not pretended that a lien would still exist under the mortgage upon the property after a valid foreclosure sale; but a different and distinct principle of equity is involved, growing out of the relation existing between the purchaser, who is the mortgagee, and the mortgagor, seeking to redeem, and would be inapplicable to a different purchaser than the mortgagee, or a different person seeking to redeem than the mortgagor, or one claiming under him.

In the discussion of this phase of the case, which might properly fall under subdivision 2 as stated above, i. e., all claims of any kind to which a court of equity would condemn the premises in the hands of the person redeeming after he had acquired the title, it will be well to take into consideration the object and purpose of the enactment of this statute of redemption. The first act on the subject of redemption was passed January 1, 1842, and was entitled, "An act to prevent the sacrifice of real estate": Clay's Digest, 502, 503. There have been some changes in the terms of this original statute since 1842, but no substantial or material change has occurred: Code 1852, secs. 2118-2120; Code 1867, secs. 2511-2513; Code 1876, secs. 2879-2881; Code 1886, secs. 1881-1883; Code 1896, secs. 3507-3510. All of these sections of the various codes are the same, and in effect are the same as the act of 1842, in so far as the principle involved in this case is concerned. They all have the same purpose as the original act, the primary object being to prevent a sacrifice of the real estate of the debtor, and thereby enable the debtor to pay with his property his indebtedness to the fullest extent of its value, as well as to afford to his other creditors an opportunity to collect their debts by bidding at its full value. In determining whether the unsatisfied balance of the mortgage debt constitutes a "lawful charge" within the meaning of the statute, the primary purpose of the statute should be borne in mind. The present case arises under

section 3510 of the code of 1896, which provides for redemption by the creditor. This section contains the same phrase, "lawful charges," as contained in section 3507, which provides for redemption by the mortgagor, debtor, or person holding under ⁶⁵⁶ him. It is a general rule of construction that words or phrases twice used in the same statute are presumptively used in the same sense, and, ordinarily, should receive such construction; but the rule is not an unbending one, or without exception. Without doing violence to any cardinal rule of construction, when possible the statute should receive that interpretation which tends to promote the ends for which it was created, and not one which would render it possible to pervert it into a means of oppression of that class for whose benefit it was passed. Where the statute is open to a construction that is in harmony with its spirit and promotive of its manifest aim and object, in order to attain the ends for which it was enacted such construction should always be given it by the court. It would be difficult to give the phrase, "lawful charges," an absolute meaning, alike applicable to all cases. That the very language itself leaves it open to interpretation by the court seems clear, and it can be safely asserted from the decisions of this court that in giving this phrase interpretation, the situation of the parties must be taken into consideration.

Conceding that the primary object of the statute was for the benefit of the debtor, it is urged by counsel for appellee in argument that to require the mortgagor, offering to redeem from the mortgagee, purchaser under the foreclosure sale of the mortgage, to pay the unsatisfied balance of the mortgage debt as a "lawful charge," and not to require the creditor, seeking to redeem, to pay such unsatisfied balance, would be conferring a greater benefit upon the creditor than upon the debtor for whose protection the statute was enacted. This contention, however plausible it may appear upon a casual consideration, is superficial and not supported by sound reasoning. An example may here serve to illustrate the fallacy of the position taken: A mortgages to B his land for ten thousand dollars, that being the value of his property. C is also a creditor of A for one thousand dollars. A makes default in the payment of the mortgage debt, and the same is foreclosed by the mortgagee, and at such sale the mortgagee becomes the purchaser for five thousand dollars, one-half of the actual value of the property. Under the equitable principle, ⁶⁵⁷ growing out of

the relation between the mortgagor and mortgagee, as laid down in *Harris v. Miller*, 71 Ala. 26, the mortgagor A coming in to redeem must pay the balance of the mortgage debt. This he is unable to do, and the result of his inability is a loss to him of one-half the value of the property, which is sacrificed by his misfortune without lessening his debt to his other creditor, C. Upon the creditor C coming in to redeem, under section 3510, in addition to the payment of the purchase price bid with ten per cent per annum thereon, together with all other lawful charges, he is further required to credit his judgment against the debtor with an amount not less than ten per cent of the price bid. It is evident that if the creditor be required to pay the unpaid balance of the mortgage debt as a "lawful charge" and in addition give to the debtor the credit imposed by the statute, such creditor would be required to pay more than the value of the property in order to redeem the same. And it is hardly reasonable to suppose that any creditor in the given case would undertake such redemption; nor is it reasonable to conclude that it was the intention of the law-making power in giving the creditor the right to redeem at the same time to make such right a practical failure. It is equally clear that in giving to the creditor the right to redeem without requiring the payment of the unpaid balance of the mortgage debt operates to the benefit of the debtor and without working any prejudice or injustice to the mortgagee, purchaser. It should not be overlooked that under section 3514 of the code of 1896, which forms a part of the chapter relating to redemption, the mortgagee, as to the unpaid balance of the mortgage debt after foreclosure sale, is himself a creditor within the meaning of the statute, and as such creditor, upon the offer of another creditor to redeem, he has a right to avail himself of the provisions contained in sections 3511, 3512, which also form a part of this chapter upon redemptions, and which provide that the offer to redeem may be met by a responsive offer to credit the debtor with like sum offered to be credited by the proposed redemptioner, which responsive offers may be alternately repeated until one or the other declines to ⁶³⁸ further credit—thereby securing to the debtor the fullest benefits intended by the statute.

It is, however, insisted by counsel for appellee in argument that the case of *Grigg v. Banks*, 59 Ala. 311, is a parallel case with the one at bar, and conclusive of the question here involved. In this conclusion counsel has evidently fallen into

error. In that case, Mrs. Grigg, who was a judgment creditor of the common debtor, Gilmer, sought to redeem by merely paying off the amount for which the property had been sold at execution sale. The facts were the property had been levied upon by attachment at the suit of Goldthwaite and Holmes against Gilmer, in which suit they obtained a judgment. Banks, who held a mortgage against the property, which, however was subsequent in time to the levy of the attachment, took a transfer of the judgment of Holmes and Goldthwaite to himself and had the property sold under execution on this judgment, he, Banks, becoming the purchaser at the execution sale. Subsequent to this sale, Banks foreclosed his mortgage upon the property, to which he had acquired title under the execution sale and became the purchaser at the foreclosure sale. Mrs. Grigg, as above stated, sought to redeem the property from Banks under the execution sale, insisting that the mortgage debt did not constitute a lawful charge. The question of an unpaid balance on the mortgage debt after foreclosure did not arise in the case. There was no question that if Banks had sold under his mortgage, after having first entered satisfaction of the judgment which he purchased, he would have been entitled to be reimbursed what he paid in the extinguishment of the prior execution lien. It was observed by the court in that case that such course should have been pursued by Banks, and the fact that he had made a mistake in selling under the execution instead of entering satisfaction of the judgment would not be visited upon him, but that a court of chancery would relieve him of such mistake and require the redemptioner to pay all the mortgage debt.

From what we have said it is our conclusion that as against the judgment creditor, offering to redeem from the mortgagee who purchased at her own foreclosure ⁶⁵⁹ sale, the unpaid balance of the mortgage debt, within the meaning of the statute, does not constitute a lawful charge which the judgment creditor, offering to redeem, is required to satisfy.

As we have stated, this being the first time that the exact question involved in this case has been presented for a decision by this court, no rule of property has been established, and the doctrine of stare decisis, insisted upon by counsel, is without application and we therefore consider it unnecessary to discuss that proposition.

The only other question presented by the demurrer to the bill is that of a misjoinder of John M. Elliott, the husband of

May R. Elliott, as a party defendant. It is shown in the bill that John M. Elliott and his wife both entered into the contract of sale with Donahoo. The bill prays that the equities of all the parties be adjusted; that John M. Elliott be required to join in a deed with his said wife upon redemption. This is not a suit upon any contract made by the wife, or upon any engagement into which she has entered within the meaning of section 2527 of the code. But whether John M. Elliott, the husband, was a necessary party or not, we think it clear that he was not an improper party to the bill.

The decree of the city court must be reversed and the cause remanded.

MR. JUSTICE TYSON DISSENTED, and maintained that if a judgment creditor undertakes to redeem from a mortgagee who purchases at the foreclosure sale, he is required to pay the balance due by the mortgagor upon the mortgage debt, in the same way that such mortgagor would be required to pay the balance of the mortgage debt remaining due if he offered to redeem from such foreclosure sale. In support of this view the learned justice cited *Gliddon v. Andrews*, 14 Ala. 733; *Dozier v. Mitchell*, 65 Ala. 511; *Beach on Modern Equity*, sec. 475; *Pomeroy's Equity Jurisprudence*, sec. 1220; 2 *Jones on Mortgages*, sec. 1070; *Collins v. Riggs*, 14 Wall. 491; *Benedict v. Gilman*, 4 Paige, 58; 20 *Am. & Eng. Ency. of Law*, 620. Continuing he said:

"If I am correct, and my assertion to this effect finds support in the language used in *Harris v. Miller*, 71 Ala. 26, that the policy of redemption under the statute is the same as at common law, it is beyond the pale of controversy that a judgment creditor coming in to redeem from the mortgagee as purchaser is bound to pay the balance due upon the mortgage debt as 'lawful charges.' As accentuating the correctness of the proposition that such is the policy of the statute, no conveyance is required by the purchaser to the redemptioner, upon redemption by a debtor, to convey the title to him acquired by such purchase: Code, sec. 3507.

"In my opinion, this principle has been expressly applied to redemption under the statute by judgment creditors in the cases of *Grigg v. Banks*, 59 Ala. 311, and *Cramer v. Watson*, 73 Ala. 127, and the words 'lawful charges' were clearly held in each of these cases to mean the same thing when applied to rights of a debtor offering to redeem from his mortgagee, as purchaser, and of a judgment creditor offering to redeem from a mortgagee, as purchaser.

"In *Mitchell v. Brown*, 6 Cold. 505, which was cited with approval in *Grigg v. Banks*, 59 Ala. 311, the supreme court of Tennessee, speaking of redemption in that state under a similar statute, said: 'It is a well-settled principle that a party who has the

legal title will not be forced to part with it until the debts he has against the party are satisfied, growing out of the transaction. The rule is, the party holding the legal title cannot be forced to a conveyance until the debts are paid.'

"Indeed, the policy that 'lawful charges' are charges upon the land without regard to the status of the title established by a sale is written in the face of the statute, as well as declared in the decisions above cited. Where redemption is sought it proceeds as though no sale had taken place, and the original security, whether it be a mortgage or a judgment, under which the purchaser derives his title, if he be the mortgagee, or the owner of the judgment, constitutes a charge upon the lands.

"We think the presumption a fair one that the opinions delivered in these cases (*Harris v. Miller*, 71 Ala. 26, *Cramer v. Watson*, 73 Ala. 127, and *Grigg v. Banks*, 59 Ala. 311) have been acted upon as a rule of property. And, therefore, the reasons which impel the courts to uphold every settled rule of property require us to reaffirm and maintain those cases, not only as to the points necessarily involved and decided by them, but also as to the principles which are declared in them.

"The result of the holding of my brothers is not only to strike down the policy of the statute as declared in *Harris v. Miller*, 71 Ala. 26, *Grigg v. Banks*, 59 Ala. 311, and *Cramer v. Watson*, 73 Ala. 127, but to confer a special privilege upon the judgment creditor to the exclusion not only of the debtor himself, but to the exclusion of the debtor's vendee, junior mortgagee, or assignee of the equity of redemption. To elevate his right above those of these classes, by relieving him from the payment of 'lawful charges,' which are 'lawful charges' upon the lands as against them, notwithstanding he could have under his judgment only condemned to its satisfaction, before foreclosure, such interest as the debtor himself had in the land, which was, after foreclosure, as we have shown, the right to redeem upon the payment of the entire mortgage debt.

"Great stress is placed upon the language used in *Harris v. Miller*, 71 Ala. 26, that 'the charges may and will vary with different purchasers.' No one doubts this. For if a stranger becomes the purchaser at a mortgage sale of lands, he would not be entitled to have paid to him more than the amount of his bid, taxes, value of improvements, and ten per cent thereon by any redemptioner, whether he be the mortgagor or his vendee, a junior mortgagee, an assignee of the equity of redemption or a judgment creditor of the mortgagor. But because this is true, it does not follow as a logical sequence that the charges may and will vary with different redemptioners from the same purchaser. On the contrary, it may be said that no such conclusion can be logically deduced. Such a conclu-

sion inevitably confers a special privilege upon the judgment creditor, an invidious distinction which I do not believe was intended to be conferred by the legislature."

FORECLOSURE—EFFECT ON LIEN OF MORTGAGE.—As to whether the lien of a mortgage is extinguished by a judgment of foreclosure, the authorities are conflicting: See 2 Freeman on Judgments, sec. 398; *Loomis v. Clambey*, 69 Minn. 469, 65 Am. St. Rep. 576, 72 N. W. 707; *Evansville Gas Light Co. v. State*, 73 Ind. 219, 38 Am. Rep. 129, and note; *Poweshiek County v. Dennison*, 38 Iowa, 244, 14 Am. Rep. 521; *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564, and note.

REDEMPTION—PAYMENT OF MORTGAGE DEBT.—In the note to *Bradley v. Snyder*, 58 Am. Dec. 570, it is said that, independently of statute, a person seeking to redeem property sold under a mortgage for less than the amount due upon it must pay or tender the whole of the mortgage debt.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

FARMERS' BUILDING & LOAN ASSOCIATION v. JONES.

[68 Ark. 76, 56 S. W. 1062.]

HOMESTEADS—ABANDONMENT.—The owner of land who removes therefrom and makes application for and procures a loan thereon, by declaring in writing that the land is not his homestead, thereby abandons it as such.

HOMESTEADS.—ABANDONMENT of a homestead by a husband binds his wife also.

J. W. House, for the appellant.

W. C. Rogers, for the appellees.

77 WOOD, J. This suit was brought by the building and loan association to foreclose a mortgage executed by Jones and his wife on certain land. The complaint also set up the right of the appellant to be subrogated to a mortgage of one D. L. **78** Coleman, which a part of the money borrowed from appellant had been used to satisfy. The defense was usury, and the failure of Mrs. Jones to acknowledge the mortgage so as to convey the homestead under the act of March 18, 1887. The trial court held: 1. That the mortgage was not properly acknowledged in accordance with said act, and was therefore void; 2. That there was no usury in the contract; 3. That appellant was not entitled to subrogation; 4. That appellant was entitled to personal judgment for the amount claimed, and judgment was so rendered.

We have carefully considered all the points raised, and find no error in the ruling of the court except in refusing to foreclose the mortgage.

Peter C. Jones was a married man, and had a large family. At the time of the application for a loan, and the execution of the mortgage, he resided with his family at Mineral Springs, in Howard county, on land which belonged to his wife's mother, where he had lived for several years. In the application which Jones made to the appellant for the loan he was asked this question: "Is this property your homestead?" and he answered, "No." He also swore to the application, using the following language:

"I, Peter C. Jones, the above-named applicant, do solemnly swear that the foregoing statements, facts and answers to the questions are absolutely and unqualifiedly true; . . . that I am the same person who made and subscribed the within and foregoing application for the advance; that I made the statements therein for the purpose of obtaining the advance, and that I fully understand that the advance, if allowed, will be made with reliance on the truth of the statements therein given, and that each and every statement made in the foregoing application is true. I also agree that the above application shall be a part of the contract between myself and the association, and I bind myself, heirs and assigns, to faithfully perform all conditions, agreements and promises contained therein.

"[Signed and sworn to.] PETER C. JONES."

The application was made on the second day of January, 1895. The mortgage in suit was executed on the twelfth day of 7th March, 1895. The above facts show clearly that Peter C. Jones, the husband and father, before and at the time of the execution of the mortgage, had abandoned his homestead. He was not living on it; and the answer in the application, and his sworn statement, made for the purpose of obtaining the loan, show that he did not claim, nor intend to claim, it as his homestead. While the act of March 18, 1887, is a limitation upon the right of the husband to convey his homestead except by the consent of his wife, it does not in any manner affect or restrict his right of abandonment. This right he has by virtue of his marital and parental authority, and when he has chosen to exercise it, as he did here, he renders the property which had formerly been his homestead the proper subject of alienation without his wife's concurrence: Thompson on Home-

steads and Exemptions, secs. 42, 276, 483; *Titman v. Moore*, 43 Ill. 169, 174 et seq.; *Guiod v. Guiod*, 14 Cal. 506, 76 Am. Dec. 440; *Thoms v. Thoms*, 45 Miss. 263, 276; *Story on Conflict of Laws*; *Williams v. Swetland*, 10 Iowa, 51.

He could not be heard after the execution of the mortgage, under the circumstances, to say that he had not abandoned his homestead; and if there was an abandonment by him, his wife is bound by it. In *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648, we said: "The husband could abandon the homestead, and it would become liable to his debts, notwithstanding the act of March 18, 1887": See, also, *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433.

The view we have thus taken renders it unnecessary to discuss the other interesting questions upon which we think the court correctly ruled. Reversed, and remanded for further proceedings not inconsistent with this opinion.

HOMESTEAD.—TO PROVE ABANDONMENT of a homestead, there must be shown an intention to abandon and an actual abandonment: *Edwards v. Reld*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202. The question of abandonment is one of fact, each case resting upon its own peculiar circumstances. The removal of the family is *prima facie* abandonment: *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840. But temporary absence does not constitute abandonment: *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110, 55 N. E. 838. Declarations of an occupant in disparagement of his right are admissible to prove abandonment: See the monographic note to *Taylor v. Hargous*, 60 Am. Dec. 608.

WHITE v. SWANN.

[68 Ark. 102, 56 S. W. 635.]

EXEMPTIONS—RIGHT OF CHILDREN OF ABSENT DEBTOR TO.—If the head of a family is absent as an absconding debtor, but has left personal property in the possession of his minor children, it must be presumed that he is only temporarily absent, and that he intends to return. His children, by their next friend, may claim his exemptions. It is immaterial in such case that the exemptions are asked for the children themselves, instead of in behalf of such debtor.

D. B. Granger, for the appellant.

J. Davis and C. Jacobson, for the appellee.

¹⁰⁴ RIDDICK, J. The question in this case concerns the right of the children of Wheeler, acting by their grandfather

and next friend, to claim for their father, in his absence, certain personal property belonging to him as exempt from execution. The statements in the affidavit attached to the schedule of property claimed as exempt show that Wheeler is a resident of the state and head of a family. So it is clear that, if he had himself made this claim of exemption, it would have been sustained. But one of the chief objects of the homestead and exemption laws is to protect the family of the debtor from destitution and want. The exemption allowed the individual debtor is small, compared with that allowed him as the head of a family. Such laws are given a liberal construction, in order, as far as possible, ¹⁰⁵ to carry into effect the beneficent purpose for which they are intended. For this reason it has been often held that the desertion of the family by the husband, still leaving them occupying the homestead, is not an abandonment of the homestead by him, the presumption in such cases being that he is but temporarily absent, and intends ultimately to return to his home and family: *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28, 27 S. W. 73; *Moore v. Dunning*, 29 Ill. 130, 81 Am. Dec. 301. And so in this case, nothing being shown to the contrary, we must presume that Wheeler, in leaving his home and family, did not intend permanently to abandon them. The presumption is that he was only temporarily absent. But when the head of the family, having the right to claim exemptions, is absent, it has been decided that not only his wife, but a son or daughter, may interpose and claim the exemption for him. Any person may do this who is authorized to take charge of and protect the property and rights of the debtor during his temporary absence. And this authority need not be expressly given, but may be presumed from circumstances: *Wilson v. McElroy*, 32 Pa. St. 82; *Waugh v. Burket*, 3 Grant Cas. 319; *Regan v. Zeeb*, 28 Ohio St. 483; *Thompson on Homesteads*, sec. 829; *Waples on Homesteads*, 877.

Now, in this case the debtor left his household furniture and other personal property in the possession of his children, intending, no doubt, that it should be preserved and used for their benefit. They being young, their grandfather took charge of them, and, acting for them and the absent debtor, claimed the property as exempt from execution. Under these circumstances, with nothing to show to the contrary, we think it should be presumed that the debtor consented to this action taken for the benefit of himself and children by one who had

rightfully assumed control of them in his absence. To hold otherwise would be to say that, if the absconding debtor had left a wife or an adult son or daughter, the law would allow the exemption to be claimed, but would refuse its protection when the deserted family consisted only of the young and helpless. Such a construction of the statute would overlook entirely the main purpose of the exemption law; for, although the exemption is¹⁰⁶ allowed the debtor, it is given to him, in part at least, for the protection of his family, who need it all the more when deserted by him during early infancy. The claim of exemption, being made in behalf of the children, and not for the debtor as head of the family, was somewhat informal; but, as before stated, the affidavit attached to the schedule states all facts required to show that the debtor was entitled to the exemption. As no special objection was made to the form, the court will consider the substance rather than the form of the proceeding.

A majority of the judges are of the opinion that this case comes within the scope and purpose of the exemption law, and think that the exemption was properly allowed.

Judgment affirmed.

HOMESTEAD.—A HUSBAND'S DESERTION of his wife and family does not deprive them of their rights in the homestead, or operate as an abandonment as to them: See the monographic note to *Taylor v Hargous*, 60 Am. Dec. 613; *Moore v. Dunning*, 29 Ill. 130, 81 Am. Dec. 801.

TRIPLETT v. MANSUR & TEBBETTS IMPLEMENT COMPANY.

[68 Ark. 230, 57 S. W. 261.]

CONDITIONAL SALES—PAYMENT—RENEWAL NOTES.—If goods are sold with reservation of title in the vendor until the purchase notes are paid, the execution of renewal notes for such debt is not a payment unless made so by agreement of the parties.

CONDITIONAL SALES—VALIDITY.—A condition in the sale of goods that if resold by the vendee before fully paid for they are to be sold as the property of the vendor, who is to retain the proceeds of such sale, is valid.

CONDITIONAL SALES—BONA FIDE PURCHASER.—If goods are sold with reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser from the vendee obtains no title, though he buys in good faith for a valuable consideration, without notice of such condition.

J. M. and J. G. Taylor and M. L. Altheimer, for the appellant.

W. T. Young, for the appellee.

281 **HUGHES, J.** This is a suit in replevin, brought in the Jefferson circuit court, by Mansur & Tebbetts Implement Company, of St. Louis, against C. H. Triplett, assignee of H. C. McGaughy, who failed in business in Pine Bluff in February, 1897, making an assignment to C. H. Triplett, the goods, wares and merchandise amounting to thirteen hundred and thirty-nine dollars and one cent. The complaint states that the plaintiff (appellee herein) is a Missouri corporation, engaged in the manufacture and selling of hardware, machinery, tools, plows, gristmills, etc.; that the defendant, C. H. Triplett, assignee (appellant herein), is the assignee of H. C. McGaughy, a hardware merchant of Pine Bluff; that during the years 1896 and 1897 the said McGaughy purchased from this plaintiff the goods, wares, and merchandise set out; that no title passed to the said McGaughy in said goods until they were fully paid for, according to the contract and agreement entered into between appellant and appellee at the time of said purchase, as follows: "And it is also agreed that the title to and ownership of all goods which may be shipped as herein provided, or during the current season, shall remain in, and their proceeds in case of sale shall be the property of, Mansur & Tebbetts Implement Company, and subject to their order, until full payment shall have been made for same by the said McGaughy; but nothing in this clause will release the undersigned from making payments as herein agreed." Prayer, that judgment be given for possession of said goods and costs. The necessary affidavit and bond in replevin were filed by appellee.

The answer admitted the sale of the goods mentioned by appellee to the said McGaughy, but denied that appellee was the owner and entitled to the possession thereof, or any part thereof, or that appellee retained the title to said goods, or any part thereof, but stated the appellant was the owner and entitled to the possession of said goods.

The case was tried before a jury on December 8, 1897. Judgment in favor of appellee for eleven hundred and eighty-nine dollars and nineteen cents and costs, and in favor of appellant for ninety-five dollars and eighteen cents. Motion for new trial filed and overruled, and appeal granted to this court.

²³² W. B. Neff, a witness on behalf of appellee, testified: That he was in the employ of appellee, and worked for it when McGaughy purchased the goods replevied herein; that he knew the goods replevied were the same as were bought of appellee; that he demanded goods from appellant before replevying them. Against the objection of appellant, counsel for appellee introduced the order made by said McGaughy for the goods replevied, upon the back of which was printed the following: "It is also agreed that the title to and ownership of all goods which may be shipped as herein provided, or during the current season, shall remain in, and their proceeds in case of sale shall be the property of, Mansur & Tebbetts Implement Company, and subject to their order, until full payment shall have been made for the same by the undersigned in money; but nothing in this clause will release the undersigned from making payment, as herein agreed." "Q. You have looked over these contracts of sale. Look at these notes, and see if they are given for the goods covered by this contract of sale. A. They are." With the changes for dates and amounts, said notes are as follows:

"\$216.10. Pine Bluff, Ark., November 17, 1896.

"December 15, 1896, after date, the subscriber, H. C. McGaughy, promises to pay to the order of Mansur & Tebbetts Implement Company, or order, \$216.10, payable at the Merchants' & Planters' Bank, with exchange on New York or St. Louis. Collection charges and interest at 8 per cent per annum from November 15, 1896, until paid. Value received. If this note is collected by suit or through an attorney, the subscriber agrees to pay ten per cent additional for costs of collection. H. C. McGAUGHY."

The said notes were not paid by the said McGaughy at the time of his assignment to appellant herein. Only goods for which the notes were given and unpaid were replevied. Those purchased before and paid for were not taken. The goods sold by appellee to said McGaughy and replevied herein were such goods as were carried for sale in a hardware or implement store.

The evidence shows that there had been a partial payment of two hundred dollars on the one note originally given for the price of the machinery appellant purchased, and for the balance two new notes were executed.

²³³ The appellant says that there are two questions of law involved in this case, of far-reaching effect and importance:

1. Where one sells goods, wares, and merchandise to a retail merchant, where the purpose of the sale is that the goods may be resold, as where a manufacturer or wholesaler sells to a retail dealer personal property on a credit, for the purpose of resale, does the doctrine of conditional sales apply or govern such a sale, in a controversy as to such articles between the original vendor and the assignee and creditors of the original vendee?
2. Where there is a conditional order and sale in the first place, and subsequently, after the delivery of the goods to the vendee, the amounts due for such purposes are closed by notes, which notes do not set out or state that the title to the goods, wares, and merchandise for which said notes are given is retained, is not the giving of said notes and their acceptance such a payment, unless the parties entered into another agreement at that time reserving title as will preclude the original vendee from claiming title to said goods when they have passed by assignment into the hands of an assignee for the benefit of creditors? And where one of said notes is paid, partly in money and partly in other notes, would not the title or lien reserved be at an end, unless the parties entered into another agreement at that time reserving title?

In answer to the first proposition of the appellant, we have to say that the question propounded therein is not involved in this case. It will be proper to decide that question when it is presented for decision. In the case at bar, the goods replevied were in the hands of the assignee of the appellant, and had not been resold to customers in the usual course of business.

In answer to the second proposition of appellant, we have to say that the giving of notes for a debt is no payment of the debt, unless by agreement of the parties the notes are taken in payment: *Blunt v. Williams*, 27 Ark. 374; *Henry v. Conley*, 48 Ark. 267. By agreement of the appellant's assignor with the appellee, made at the time the goods were ordered, he was to execute his notes for the purchase price, and the title to the ²³⁴ goods was to remain in the appellee until the goods were fully paid for. Execution of a renewal note for the debt or part of it was not payment of the debt, unless taken as such. According to the contract of the parties, if the goods were sold by McGaughy, they were to be sold as the property of the appellee, and the proceeds of the sale were to be and remain the property of the appellee. Such an agreement is valid: *New Haven Wire Co. Cases*, 57 Conn. 352, 18 Atl. 266; *Dewes Brew-*

ery Co. v. Merrit, 82 Mich. 198, 46 N. W. 379; Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384.

The appellant concedes, and the law is, that when personal property is sold under an agreement that the title to the property shall not pass, but remain in the vendor until fully paid for, no act of the buyer can prevent recovery of the property by the seller, if the same is not paid for. "When a chattel is sold with reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser from the vendee acquires no title, though he buys in good faith for a valuable consideration and without notice of the condition": McIntosh v. Hill, 47 Ark. 363, 1 S. W. 680; Simpson v. Shackelford, 49 Ark. 63, 4 S. W. 165; Edgewood Distilling Co. v. Shannon, 60 Ark. 133, 29 S. W. 147; Arkansas cases passim.

The judgment is affirmed.

CONDITIONAL SALE.—THE SELLER OF GOODS MAY, by appropriate contract, retain the title thereto until the performance of some condition on the part of the buyer. The fact that the property is to be resold by the latter does not affect the rule: Vermont Marble Co. v. Brow, 109 Cal. 236, 50 Am. St. Rep. 87, 41 Pac. 1031.

CONDITIONAL SALE—BONA FIDE PURCHASER.—One who sells goods with knowledge that they are to be put on sale is estopped, as against an innocent purchaser, from claiming that the sale was conditional and that the title had not passed: Lewenberg v. Hayes, 91 Me. 104, 64 Am. St. Rep. 215, 39 Atl. 469; Elsenberg v. Nichols, 22 Wash. 70, 79 Am. St. Rep. 917, 60 Pac. 124. Compare Smith v. Clewa, 114 N. Y. 190, 11 Am. St. Rep. 627, 21 N. E. 160.

STATE v. WILLIAMS.

[68 Ark. 241, 57 S. W. 792.]

IDEM SONANS—VARIANCE BETWEEN INDICTMENT AND PROOF.—Under an indictment for unlawful cohabitation with a woman named "May Hite," proof that the accused unlawfully cohabited with a woman named "May Hyde" is a fatal variance.

IDEM SONANS.—The names "Hite" and "Hyde" are not idem sonans.

J. Davis, attorney general, C. Jacobson, and S. D. Campbell, prosecuting attorney, for the appellant.

²⁴¹ BUNN, C. J. The material part of the indictment charges that "the said Josephus Williams, being a man, and

May Hite, being a woman, in the county and state aforesaid, on the first day of November, 1898, did unlawfully cohabit together as husband and wife, without being married." Upon a plea of "not guilty," a jury was impaneled to try the issues, and the state offered the following testimony: Monroe Claxton testified that he was acquainted with defendant Williams; that he ²⁴² did not know a woman by the name of May Hite, but he knew May Hyde; that defendant and the woman Hyde lived together in the same house in the bottom during part of the year 1868. On being questioned by the court, witness said the woman's name was spelled "Hyde." The court then ruled, over the objections of the state, that the two names Hyde and Hite are not idem sonans, and refused further testimony on the part of the state, unless it could show that May Hite was in fact the same as May Hyde, the state having offered to prove by two other witnesses the acts of cohabitation, and by one other (the clerk of the county and probate court) that, so far as his records showed, the defendant had never been married to May Hyde or May Hite, all of which testimony the court refused to admit, because witnesses did not identify the woman as May Hite as named in the indictment, but referred to May Hyde only. The defendant objected to all testimony referring to May Hyde, and not to May Hite, for the same reason, and his objections were sustained by the court.

The foregoing being all the testimony in the case, the court gave the following charge to the jury: "Gentlemen of the jury: It is conceded by the state that, under the rulings of the court, the state has failed to make out a case, and your verdict will be 'Not guilty.' The thing falls simply from the ruling of the court that the name of the woman is wrong. The proof shows that the name of the woman is May Hyde, while the indictment charged May Hite, and for that reason defendant is not convicted." All proper exceptions were saved. The jury returned a verdict of not guilty, in obedience to the direction of the court. Motion for new trial was filed and overruled and state took her bill of exceptions and appealed.

The court directed the verdict because of a variance between the proof and allegation in the indictment as to the name of the woman jointly indicted with the defendant, who, however, was not arrested. It is well to state, also, that the doctrine of idem sonans may not necessarily have the same effect in the case against the woman as in this case, as the name of the woman in this case against Williams is merely descriptive of

the offense, while in a case against her it would but denominate²⁴³ the party defendant. The state sought to have the court declare that the two names are idem sonans, and therefore the same in law. This declaration the court declined to make, but on the contrary, declared that the two names are not idem sonans. The rule in questions like this is thus stated in 4 American and English Encyclopedia of Law, pages 769 and 770: "Where two names, though spelled differently, necessarily sound alike, the court may, as matter of law, pronounce them to be idem sonans; but, if they do not necessarily sound alike, the question is for the jury. A literal variance in the spelling of the word is not alone fatal, when the omission or addition does not make it a different word; and this diversity in the spelling of a name is not material where it is idem sonans." This is the rule laid down also in *Commonwealth v. Warren*, 143 Mass. 568, 10 N. E. 178.

The letter "d" and the letter "t" are both dentals, but have not necessarily the same sound, by any means. The "d" has a broader and (we may say) a more lengthened sound, ordinarily, than "t," which has a sharp, shorter sound, and yet the difference grows less, according to their places in a word or name. Thus Wadkins and Watkins have been held to be idem sonans, because in casual pronunciation there is scarcely any difference in the sounds. But this similarity of sound does appear in the words "ride" and "rite," because there is a prominence given to the two letters which brings out their nominal difference in sound. So it is in the names involved in this case. There is not the same sound necessarily in Hyde and Hite, as there is in "Hyde" and "Hide," where the play is upon "y" and "i," two letters which have identically the same sound where used in such a connection.

There are many cases where it is held that, notwithstanding the doctrine of idem sonans does not strictly apply, yet the doctrine of interchangeability of names applies, as was applied in *Commonwealth v. Warren*, 143 Mass. 568, 10 N. E. 178, where the controversy arose as to the two names of "Celestia" and "Celeste"—the name of one of the witnesses in the case—as the first wife of defendant, in a trial for polygamy. That rule is not sought to be applied in this case, however, and is only applied in²⁴⁴ cases to be submitted to the jury to determine the fact of whether or not the person is known by one name as well as the other.

Our conclusion is that Hyde and Hite are not idem sonans, and that the trial court did not err in that regard. The judgment is therefore affirmed.

Battle, J., absent.

IDEM SONANS.—FOR APPLICATIONS of the doctrine of idem sonans, see *Moore v. Allen*, 26 Colo. 197, 77 Am. St. Rep. 255, 57 Pac. 698; *State v. White*, 34 S. C. 59, 27 Am. St. Rep. 783, and note, 12 S. E. 661; *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852, 19 S. W. 847. Identity of sound is a surer designation of names than identity of orthography: *Note to Schooler v. Asherst*, 13 Am. Dec. 233. If two names may be sounded alike without doing violence to the power of the letters found in the variant orthography, the variance is immaterial: *Pitsnogle v. Commonwealth*, 91 Va. 808, 50 Am. St. Rep. 867, 22 S. E. 351.

O'LEARY v. ABELES.

[68 Ark. 259, 57 S. W. 791.]

BANKS AND BANKING—CHECKS—PAYMENT.—If the holder of a check delivers it to a bank for collection, which sends the check by mail to the drawee, who, upon its receipt, having money on deposit to the credit of the drawer, indorses the check "paid," and afterward delivers it to the drawer, the check is deemed paid as between the holder and the drawer, even if the bailee bank, instead of receiving cash, takes exchange which turns out to be worthless. In such case the loss which the holder thereby sustains is regarded as the result of his own negligence or that of the bank holding the check for collection. This rule is not affected by any usage or custom where such methods of collection obtain.

BANKS AND BANKING—CHECKS SENT FOR COLLECTION—INSOLVENCY OF BANK—LIABILITY OF DIRECTOR.—If the payee of a check delivers it to a bank for collection, and that bank sends the check to the drawee bank, which, having funds to the drawer's credit, indorses the check "paid," and sends a draft to the collection bank for the amount, surrendering the check to the drawer, the check must be deemed to have been paid as between the drawer and the payee, though such draft proves to be worthless, and the drawee bank subsequently fails, and the fact that the drawer of the check is a director in the drawee bank does not render him liable for the resulting loss, provided he has acted in good faith with his creditor, the payee of the check.

Action on an account. Abeles mailed to O'Leary his check on the First National Bank of Little Rock for a certain amount in payment of the sum in suit. O'Leary received such check, indorsed it to, and deposited it with, the Iron City National Bank of Pittsburg, Pennsylvania, for collection. That bank sent the check to the drawee bank for collection, and received

from the drawee bank in payment a draft on the Southern National Bank of New York, which it, on the same day, indorsed to the Chemical National Bank of New York. This draft was returned to the Iron City National Bank, protested and unpaid. Abeles had funds in the drawee bank at the time he drew the check in favor of O'Leary, and afterward received the check back, marked "paid" by such bank. Abeles was a director in the drawee bank during the time of all the transactions mentioned above, and made a deposit therein on the day it failed. Judgment for the defendants and plaintiffs appealed.

C. B. Moore, for the appellants.

E. W. Kimball, for the appellees.

202 WOOD, J. When the holder of a check delivers same to a bank as his bailee for collection, and the bank sends the check by mail to the drawee, who lives at a distance, and the drawee, upon receipt of the check, having money on deposit to the credit of the drawer, indorses the check "Paid," and afterward delivers same to the drawer as between the payee or holder and the drawer, the check is paid; for, if the holder chooses this method of collection, and the bailee bank, instead of receiving the cash, takes, for the amount of the check, exchange which turns out to be worthless, the loss which the holder thereby sustains is regarded as the result of his own negligence, or that of the bank holding same for collection. This doctrine applies here: *Anderson v. Rodgers*, 52 Kan. 542, 36 Pac. 1067, 27 L. R. Ann. 248, and authorities there cited; also note to same; 1 Daniel on Negotiable Instruments, 328a; 3 Am. & Eng. Ency. of Law, 2d ed., 804; Bolles on Banks and Bankers, sec. 295; *Anheuser-Busch Brewing Assn. v. Clayton*, 56 Fed. 759; 13 U. S. App. 295; *Wagner v. Crook*, 167 Pa. St. 259, 46 Am. St. Rep. 672, 31 Atl. 576; *Zane on Banks and Banking*, sec. 171 et seq., 188; *Minneapolis Sash etc. Co. v. Metropolitan Bank*, 76 Minn. 136, 77 Am. St. Rep. 609, 78 N. W. 980. See, also, *Loth v. Mothner*, 53 Ark. 116, 13 S. W. 594. See, contra, *McIntosh v. Tyler*, 47 Hun. 99; *Indig v. National City Bank*, 80 N. Y. 100; *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 285. The rule, it seems, is not affected by any usage or custom where such methods of collection obtain: *Minneapolis Sash etc. Co. v. Metropolitan Bank*, 76 Minn. 136, 77 Am. St. Rep. 609, 78 N. W. 980, and authorities cited.

2. There is no rule of law that would make Abeles liable for the loss resulting from the transaction in proof because of his being a director in the drawee bank. He is not shown to have been negligent in the discharge of any of his duties as director, whereby the loss was occasioned. He is not charged with fraud, but the proof shows affirmatively that he acted in good faith with his creditor. He believed the bank solvent, as shown by his depositing money therein on the very day his check was presented for payment. The bank was open and doing business on that day. Certainly, there was nothing in his duties as director that would charge him with the knowledge that a check drawn by him on funds in the bank to his credit would not be properly presented for collection, and collected in ²⁶³ money, instead of worthless exchange. Good faith only is required of him in matters of this kind: *Hayes v. Beardsley*, 136 N. Y. 299, 32 N. E. 855. See, also, *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. Rep. 924.

Affirmed.

Battle, J., did not participate.

BANK AS COLLECTING AGENT.—THE LIABILITY growing out of a bank sending a check, which has been intrusted to it for collection, directly to the drawee bank, is considered in the monographic note to *Minneapolis etc. Co. v. Metropolitan Bank*, 77 Am. St. Rep. 623-625.

JAMES v. ORRELL.

[68 Ark. 284, 57 S. W. 931.]

BAILMENTS — NEGLIGENCE — BURDEN OF PROOF.—If goods which are the subject of a bailment are lost, the burden of proof of negligence is on the bailor. Proof merely of the loss is not sufficient to put the bailee on his defense, and shift the burden of proof.

NEGLECTENCE — BURDEN OF PROOF.—Negligence is an affirmative fact to be established by evidence on the part of the party alleging the facts constituting such negligence.

Action to recover the value of a bale of cotton claimed to have been stolen from the bailee through his negligence, and also for the value of seven other bales of cotton alleged to have been lost through his negligence in allowing his cotton-gin to be destroyed by fire. Judgment for plaintiffs and defendant appealed.

J. F. Sellers, for the appellant.

C. C. Reid, for the appellees.

287 HUGHES, J. The defendant offered to prove on the trial that the cotton was being withheld by him from being ginned at the instance and request of Gray, one of the appellees, at the time it was stolen, and at the time of the burning of the gin, and this was not allowed by the court, to which he excepted, and made this the first ground of his motion for a new trial. Appellant contends this should have been allowed, because the appellees requested that the ginning should be delayed until they could gather a certain field of cotton, that it might all be ginned at the same time; that, having withheld the ginning thus at the request and for the accommodation of appellees, a less degree of care was required of him to keep the cotton safely. While we would not reverse the case for failure to allow this testimony, we think it should have been allowed, that the jury might be in possession of all the facts that might bear upon the case.

There was prejudicial error in the court's instruction to **288** the jury as to the burden of proof. It told the jury that, "the loss of the cotton being admitted, the burden is upon the defendant to show that such loss was not caused by the negligence of him or his servants; and, unless you find by a preponderance of the evidence that the loss was not caused by such negligence, your verdict will be for the plaintiff." This is error, for which the judgment must be reversed. Judge Story, in his work on Bailments, eighth edition, section 410, says: "With certain exceptions, which will hereafter be taken notice of, as to innkeepers and common carriers, it would seem that the burden of the proof of negligence is on the bailor, and proof merely of the loss is not sufficient to put the bailee on his defense. This has been ruled in a case against a depositary for hire, where the goods bailed were stolen by his servant." "Properly understood, it seems to be clear that the burden of proof must always be upon the plaintiff to make out all the facts upon which his case rests; and, as negligence is the foundation of the action between bailor and bailee, that the duty of proving such negligence is on the former, rather than that of disproving it on the latter. That the burden is on the plaintiff in other cases founded on negligence is now quite generally agreed. . . . Negligence is no more to be presumed in such cases than in any other." There is some discrepancy in the

cases, but "the best considered modern authorities, in which the question has been most directly discussed and decided, support the views above expressed": Story on Bailments, secs. 213, 278, 339, 410a, 454, and authorities, notes 3 and 4.

"All bailees, with or without a special contract, are prima facie excused when they show loss or injury by act of God, or of public enemies; and ordinary bailees in a variety of lesser instances, such as fire, loss by mobs or robbery": Wilson v. Southern Pac. R. R. Co., 62 Cal. 164, as to loss by fire; 3 Am. & Eng. Ency. of Law, 750, 751, and cases.

Negligence is an affirmative fact, to be established by proof Rutledge v. Missouri Pac. Ry. Co., 123 Mo. 121, 24 S. W. 1053; 27 S. W. 327. The burden of sustaining the affirmative of an issue involved in an action is upon the party alleging the facts constituting the issue: Heinemann v. Heard, 62 N. Y. 448.

²⁸⁹ The appellant asked the court to instruct the jury that the burden as to negligence was on the plaintiff, which he refused to do. This was error. For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

Bunn, C. J., and Battle, J., not participating.

BAILMENT.—THE BURDEN OF PROOF as between bailor and bailee is as follows: The bailor must prove the fact of bailment; then the bailee must, if he wishes to exonerate himself from liability for loss, show the fact and manner of loss; and the bailor must assume the burden of establishing that the loss was due to the negligence of the bailee: Note to Knights v. Piella, 66 Am. St. Rep. 379.

BINGHAMPTON TRUST COMPANY v. AUTEN.

[68 Ark. 299, 57 S. W. 1105.]

FRAUD AND DECEIT—ELECTION OF REMEDIES.—A person who is induced to purchase property by deceit and fraud has an election of remedies. He may rescind the contract, and to do this he must return, or offer to return, what he has received, or he may affirm the contract and sue for damages, and in the latter event he need not return, nor offer to return, what he has received under the contract.

FRAUD AND DECEIT—DAMAGES—OFFER TO RETURN PROPERTY.—A person induced to buy worthless notes through the fraud and deceit of the seller in making representations as to the maker's solvency may maintain an action to recover for such fraud, without returning such notes.

PRINCIPAL AND AGENT—FRAUDULENT ACT.—A bank is liable for the fraudulent act of its president committed in the course of his duties and employment, although the directors of the bank have no knowledge of, and do not authorize, such fraud.

USURY—CONFLICT OF LAWS.—If a contract for the payment of interest is valid under the law of the state where made, the defense of usury cannot be set up against it in another state, especially when the interest agreed upon is not excessive in the latter state.

Blackwood & Williams, for the appellant.

Hill & Auten, for the appellee.

304 RIDDICK, J. This is an action by the Binghampton Trust Company against the First National Bank of Little Rock to recover damages for deceit.

The company does not ask for a rescission of its contract with the president of the bank by which it became the owner of the note of McCarthy-Joyce Company. It asks for damages for deceit and fraud practiced upon it by which it was induced to pay out a large sum of money for the worthless note of an insolvent company. A party who is induced to purchase property by deceit and fraud has an election of remedies. He may rescind the contract, and to do this he must return or offer to return what he has received under it. On the other hand, he may affirm the contract, and sue for damages occasioned by the deceit and fraud, and in that event he is not required to return or offer to return what he has received under the contract. These rules are well settled, and the contention of the bank that plaintiff should have returned or offered to return the notes must be overruled: *Goodwin v. Robinson*, 30 Ark. 535; *Matlock* **305** *v. Reppy*, 47 Ark. 148, 14 S. W. 546; 14 Am. & Eng. Ency. of Law, 2d ed., 168, and cases cited.

The next contention is that Allis was not acting for the bank, but for the McCarthy-Joyce Company, and that he had no authority to bind the bank by his false representation. Allis was president of the bank to which the McCarthy-Joyce Company was indebted in a large amount. This company was financially embarrassed, and in fact insolvent. As president of the bank, Allis was endeavoring to collect this debt. For this purpose these notes were executed and delivered to him, and for this purpose he negotiated them to the trust company. His letter to the trust company by which he effected the sale of the notes is written on paper upon which is the bank's letter-head. He assumes in the letter to be acting for the bank,

and directs the company to remit the proceeds to "our credit" (meaning the bank), and signs the letter, "H. G. Allis, President." As president of the bank, it was his duty to endeavor to collect the debt which McCarthy-Joyce Company owed it. While he may have been trying to befriend the McCarthy-Joyce Company as well as to protect the bank, the evidence leaves no doubt in our minds that in this matter he was acting for the bank, and endeavoring to protect its interests. It is a matter of no moment that the directors of the bank did not know or authorize the false representations of Allis. We must, to quote the language of Mr. Benjamin, "distinguish between authority to commit a fraudulent act and authority to transact the business in the course of which the fraudulent act was committed." The bank, of course, did not authorize Allis to commit a fraud, "but it intrusted him with the conduct of this class of business, and he conducted it unfairly, and committed the fraud in the course of his employment": Benjamin, Q. C., in *Mackay v. Commercial Bank*, L. R. 5 P. C. 402. If a conductor having charge of a railway train in the course of his business commits an assault upon a passenger, the company may be liable for the damages, though it neither authorized or desired its agent to commit such an assault; for the principal is liable for the wrong of the agent committed in the course of his duties as agent. On the ³⁰⁰ same principle, a bank is liable for the fraud of its agent committed in the course of the bank's business. This rule is often applied, and hardly needs citation of cases to support it. In this case, as before stated, the fraud was committed by Allis as a means of collecting a debt due the bank from another party. It was done in the interest of the bank, and the bank received the money obtained by his fraud. Under these circumstances, the bank cannot at the same time retain the benefit and avoid the liability. That the bank is liable for the damages occasioned by this fraud of its agent, at least to the extent of the benefit received by it from the fraud, follows from settled rules of law, as well as from the plainest principles of justice: *Mackay v. Commercial Bank*, L. R. 5 P. C. 394; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Swire v. Francis*, L. R. 3 App. Cas. 106; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162, 36 Am. Rep. 595. The question of the authority of the company to discount notes is also involved in this case, but we have already determined that the bank had such authority, in another case between the same parties, and refer to our opinion

in that case for our reasons for this conclusion: *Binghampton Trust Co. v. Auten*, 68 Ark. 294, 57 S. W. 936.

The only remaining question arises on the contention by the bank that the discount of the notes by the trust company at the rate of seven per cent per annum was, under the laws of New York, illegal and usurious. Now, conceding that this was a loan, and not a mere purchase of the note, the trust company could, under the New York statute of 1892, charge six per cent interest and reasonable collection charges. In the absence of any proof as to what the collection charges were, we are not sure that we could hold the seven per cent to be usurious under New York law, and it certainly would not be under the law of this state. But we need not discuss that question further; for, in order to show usury in this transaction, the defendant corporation relies upon a law of New York, but under another statute of that state a corporation cannot interpose the defense of usury. The statute, as construed by the courts of that state, operates to make lawful the contract of a corporation for the loan of money to itself which would ³⁰⁷ otherwise be usurious and void: *Rosa v. Butterfield*, 33 N. Y. 665; *Lane v. Watson*, 51 N. J. L. 188, 17 Atl. 117; *Junction R. R. Co. v. Bank of Ashland*, 12 Wall. 226. This statute applies to all corporations borrowing money in New York, and we know of no reason why it should not apply to a national bank. If there is any class of corporations which should not be permitted to plead usury, certainly banks should not be allowed to do so. All parties to this contract were corporations, and the contract was valid under the law of New York; and, if valid in the state where made, it is valid everywhere. If it was an Arkansas contract, it was valid, because it is not unlawful to charge seven per cent in this state. So there is no usury, whether it is a New York or an Arkansas contract.

The note which the trust company was led to purchase through the fraud of the bank's president was shown to be worthless, and we think the trust company has made out a clear case to recover damages to the amount it paid to the bank on the note purchased. The judgment of the circuit court will be reversed, and a judgment entered here for that amount in favor of the trust company, with interest from date of payment.

Battle, J., did not participate.

SALE—RESCISSION FOR FRAUD.—A VENDEE cannot retain the property and treat a sale as void for fraud: *Burton v. Stewart*,

3 Wend. 236, 20 Am. Dec. 692. He need not return the property, however, if it is worthless: Note to Reed v. Randall, 86 Am. Dec. 818.

SALE OF BOND—FRAUD OF VENDOR.—If the sale of a bond is induced by fraud of the vendor, the vendee, upon discovering its worthlessness, may maintain an action to recover the money paid for it: Ripley v. Case, 78 Mich. 126, 18 Am. St. Rep. 428, 43 N. W. 1097.

FRAUD.—A PRINCIPAL IS LIABLE in a civil action for the fraud or other misfeasance of his agent perpetrated in the course of his employment, although he did not authorize, justify, or know of the misconduct: Jarvis v. Manhattan Beach Co., 148 N. Y. 652, 51 Am. St. Rep. 727, 43 N. E. 68; Fifth Avenue Bank v. Forty-second St. etc. Ry. Co., 137 N. Y. 281, 38 Am. St. Rep. 712, 33 N. E. 878.

ARKADELPHIA LUMBER COMPANY v. McNUTT.

[68 Ark. 417, 59 S. W. 761.]

ATTACHMENTS—PRIORITY.—If writs of attachment are placed in the hands of different officers to be levied, the one first levied upon the defendant's personalty acquires priority.

ATTACHMENT—PRIORITY.—THE LEVY OF A SPECIFIC ATTACHMENT upon personalty for the purchase price thereof does not create a lien superior to that created by a prior levy of a general attachment on the same property.

ACTIONS—RIGHT TO SET ASIDE LIEN.—Unless a person is injuriously affected by a lien, he has no right to institute an action to set it aside.

J. E. Bradley, for the appellant.

D. McMillan and J. H. Crawford, for the appellees.

421 BATTLE, J. Appellees fail to show in their complaint any cause of action against the appellant. They show that appellee, S. R. McNutt, had acquired a lien on the planer, the property attached, prior to that claimed by the appellant. The planer was seized by the sheriff under the order of attachment in favor of McNutt, and was in the possession of that officer before the constable undertook to levy upon it under the order in favor of the Arkadelphia Lumber Company. This being true, the lien acquired by McNutt was prior and superior to any that could have been claimed by the lumber company: Derrick v. Cole, 60 Ark. 394, 30 S. W. 760. The fact that the debt the appellant sought to recover by his action was for the purchase money for which the planer sold did not create a lien. It only excepts it from exemption from seizure and sale under an execu-

tion in favor of the vendor or his assigns upon a judgment for the purchase money, and enables the vendor or assigns, in a suit for the purchase money, to seize the planer at once, if in the control of the vendee, without alleging the ordinary grounds for an attachment: *Bridgeford v. Adams*, 45 Ark. 136. The action instituted for the purchase money, the issue of an order under section 4728 of Sandel and Hill's Digest, and seizure under such order do not give to a lien thereby acquired precedence over that created by the levy of an order of attachment prior in time to such seizure. The lien in the action for the purchase money is subject to that of the order of attachment: *Swanger v. Godwin*, 49 Ark. 290, 5 S. W. 319; *Fox v. Arkansas Industrial Co.*, 52 Ark. 450, 12 S. W. 875.

⁴²² Appellees fail to show any cause of action in favor of any of them. All they allege as to any of the coappellees of McNutt is as follows: "That after said levy was made (that is, the levy of the order of attachment in favor of McNutt) the plaintiffs, J. C. Wallis, Dave Graves, and J. M. Gordon, each having instituted suits in justice of the peace courts against said Edgerton, caused said suits to be transferred to said court of common pleas, where by proper orders said causes were consolidated with the case of *S. R. McNutt v. H. J. Edgerton*, and thereafter prosecuted under the name and style of *S. R. McNutt et al. v. H. J. Edgerton*." The coappellees do not show a cause of action against anyone—simply show that they instituted suit.

No one has a right to complain of a lien which does not injuriously affect him. He has no right to constitute himself guardian of another, and interpose a defense in an action against such person, or have a judgment in such action set aside "on the ground that the defendant had defenses which he might have asserted, or that, in the transaction between the plaintiff and the defendant out of which the judgment grew, the former overreached the latter." Unless he is injuriously affected, he has no right to institute an action to set aside a lien, sale or judgment: *Glaser v. First Nat. Bank*, 62 Ark. 175, 34 S. W. 1061. In the case before us the appellees did not show that they were affected by any lien claimed by the appellant. The demurrer to their complaint should have been sustained.

The judgment of the circuit court is therefore reversed, and the cause is remanded, with instructions to the court to sustain the demurrer, and allow the appellees to amend their

complaint, so as to show a cause of action, if they can, and so desire.

Wood, J., dissents.

ATTACHMENTS—PRIORITY.—IF SEVERAL WRITS of attachment are placed in the hands of a sheriff, they are entitled to priority in the order in which they are received: *Atchison etc. R. R. Co. v. Schwarzschild*, 58 Kan. 90, 62 Am. St. Rep. 604, 48 Pac. 591. See, also, *Jump v. Batton*, 35 Mo. 193, 86 Am. Dec. 146. Successive attachments should be satisfied in the order of their priority, and not pro rata. The first attaching creditor is entitled to full satisfaction of his judgment and costs, in preference to others whose attachments are of later date: *Hepp v. Glover*, 15 La. 461, 35 Am. Dec. 206.

NEBRASKA NATIONAL BANK v. WALSH.

[68 Ark. 433, 59 S. W. 952.]

STATUTES — PENAL — WHAT ARE.—The prime object of every statute, strictly penal, is to enforce obedience to the mandates of the law by inflicting punishment upon those who disregard them. In such statutes the provision for punishment never rests in uncertainty, and is never based upon a contingency.

STATUTES—WHETHER PENAL OR REMEDIAL.—Statutes giving the remedy to the party aggrieved are never regarded as penal, but remedial, even though such party is given damages beyond indemnity, or mere compensation.

LIMITATION OF ACTIONS—STATUTORY LIABILITY.—A statute providing that if the officers of any corporation shall neglect or refuse to file the certificate required by law they shall jointly and severally be liable for all debts of such corporation contracted during the period of such neglect or refusal, creates a statutory, and not a penal, liability, which is barred in three years under the statute applicable to all actions founded upon any contract or liability, express or implied, not in writing.

Action to recover the statutory liability arising under sections 1337, 1346, and 1347 of Sandel and Hill's Digest of the laws of Arkansas, as follows:

"Sec. 1337. The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or July next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in; the cash value of its personal estate;

the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder; which certificate shall be deposited on or before the fifteenth day of February or August with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"Sec. 1346. The certificates required by sections 1334, 1337, 1343, and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly.

"Sec. 1347. If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action, founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal."

The defendant pleaded the statute of limitations and recovered judgment. Plaintiff appealed.

Rose, Hemingway & Rose, for the appellant.

J. M. Moore and J. A. Watkins, for the appellee.

436 WOOD, J. The statute upon which this action was founded does not come within the scope of the statute of limitations of two years. That statute is as follows: "All actions upon penal statutes, where the penalty or any part thereof, goes to the state, or any county or person suing for the same, shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued": Sandel and Hill's Digest, sec. 4826.

1. The prime object of every statute strictly penal is to enforce obedience to the mandates of the law by inflicting punishment upon those who disregard them; and, in statutes primarily and properly penal, the provision for punishment never rests in uncertainty, is never based upon a contingency. The general public is supposed to be injured by the violation of every penal statute, whether any special injury results to any particular individual or class of individuals or not. The punishment is provided as a sanction to the law, and is imposed for the public good, to deter others from the commission of like

offenses. It would, therefore, be palpably incongruous to call a statute penal which did not contain a definite and certain provision for punishment in every case where the duties enjoined by it were ignored: Black's Law Dictionary, "Penal Statutes," "Penal Laws"; Bouvier's Law Dictionary, "Penal Statutes"; Potter's Dwarrris on Statutes, 74. Measured by these simple but infallible tests, the statute upon which this action was based is not penal. Here the behests of the law may be ignored repeatedly ⁴³⁷ by the officers failing to file the certificate required, and still no unpleasant or severe consequences would be visited upon them unless there were creditors who had debts contracted with the corporation during the period of such disobedience. And even then the officers could be made to pay only at the instance of these creditors, and not by them if the debts had already been paid by the corporation. This shows conclusively that the public in general is not one whit interested in the enforcement of the duties enjoined by this statute, and that punishment of the officers for failure to perform the duties it prescribes is not the dominant idea. The duty which the statute enjoins upon, and the liability which it creates against the officers is in favor of creditors. The measure of the liability is the amount of the debts which the corporation has incurred. There is no arbitrary amount fixed as a pecuniary mulct against the officers for each failure to file the certificate required. The amount is fixed, for compensation and indemnity, at the actual amount due the creditors. No additional sum is allowed them against the officers. They are only required to pay to prevent a loss which would otherwise result, directly or indirectly, from their neglect or failure. "By the principles of the common law," says Judge Thompson, "all men are answerable out of their estates for the debts which they contract by themselves or their agents. Now, when the legislature says that the managing officers of corporations shall not enjoy this granted immunity, provided, . . . they fail to make and publish certain reports to apprise the public of its financial condition, it is no more than to say to them that these things which it requires of them are conditions precedent upon which alone they shall enjoy this granted immunity": 3 Thompson on Corporations, sec. 4164; National New Haven Bank v. Northwestern Guaranty Loan Co., 61 Minn. 375, 63 N. W. 1079. The liabilities created, and the remedies provided, by this statute are private and civil. There is nothing in the mere wording to give it even a penal semblance, which,

of itself, is persuasive. We conclude, from these considerations, that the statute is not penal, but highly remedial, even when construed independent of the statute of limitations.

⁴³⁸ 2. But when viewed, as we must view it here, in connection with that statute, the correctness of the above conclusion seems all the more obvious. The statute of limitation was modeled after 31 Elizabeth, chapter 5, section 5. According to the familiar rule, which we have often followed, where a statute is borrowed from another jurisdiction in which it has received definite construction, it is taken with the construction which has there been placed upon it. Up to 1838, when our statute of limitation was passed, penal statutes in England were limited to actions brought either for the government by the public prosecutor, or to *qui tam* actions brought, not by the party injured or aggrieved, but by anyone else who prosecuted both for himself and the queen—the common informer. “*Qui tam pro domino rege quam pro se ipso in hac parte sequitur.*” But statutes which gave the remedy to the party aggrieved were never regarded as penal, but as remedial, even though such party might have been given damages beyond indemnity or mere compensation: *Woodgate v. Knatchbull*, 2 Term Rep. 148; *Ward v. Snell*, 1 H. Black. 10; *Bones v. Booth*, 2 W. Black. 1226.

But, whether our statute was borrowed from England or not, it is very similar to 31 Elizabeth and the distinction *supra*, between penal and remedial statutes, under it was correct then, and, under the peculiar wording of our statute, it is correct now; for, in our opinion, the phraseology of our statute indicates that the legislature had in mind only those statutes which imposed a pecuniary mulct for the doing or not doing of some act commanded or forbidden by the law for the benefit of the public, and for which pardon might be granted, and for which the government alone, or its designated agent, or the common informer, might bring an action; in other words, penal statutes in the strict and proper sense, and not statutes creating private rights and remedies. The words, “or person,” mean simply any other person who sues as a common informer, and not one having a special interest by reason of any injury or grievance. The words, “or cause of action shall have accrued,” refer to those numerous penal statutes where the cause of action does not accrue to the state or county until the common informer ⁴³⁹ has been given an opportunity to sue for the penalty, or vice versa, or to cases where an opportunity is given to the offender to make compensation or restitution, before he can be pro-

ceeded against. In all such cases, of course, the cause of action accrues after the commission of the offense.

We are aware that there is quite an array of respectable authorities holding that statutes similar to the one sued on here are penal, and subject to the statute of limitations for suits based on penal statutes: See brief of counsel for appellee.

Much depends, of course, upon the language of the respective statutes as to the construction to be given them and the correct application of the decisions construing them. Many New York cases are cited as authority for holding our statute penal. The New York limitation statute is as follows: "An action upon a statute for a penalty or forfeiture when the action is given to the person aggrieved, or to that person and the people of the state, except where the statute imposing it prescribes a different limitation, shall be brought within three years." Other cases based on statutes embodying similar language are cited. We do not consider cases based upon such statutes as in conflict with the view we have expressed, it matters not in what language the opinions may be couched; for the words, "when the action is given to the person aggrieved," may have been considered by those courts as tantamount to a legislative determination that actions by aggrieved parties to recover on statutes similar to ours are penal.

With due deference to all authorities which hold that statutes similar to ours are penal, we are constrained to believe that such views are erroneous, and we fully agree with Mr. Morawetz that "it is not quite clear what the courts mean to express by saying that statutes of this character are penal, and that they impose upon the directors a penal liability": 2 Morawetz on Corporations, sec. 908. The better view, as Judge Thompson says, is that expressed by the supreme court of Georgia, in the early case of *Neal v. Moultrie*, 12 Ga. 116. This opinion is usually clear and strong. The following authorities also support the view we have taken: *Goodridge v. Rogers*, 22 Pick. 495; *Adams v. Palmer*, 6 Gray, 338; *Norfolk v. American Steam Gas Co.*, 103 Mass. 160-162; *Nickerson v. Wheeler*, 118 Mass. 298; *Mokelumne Hill etc. Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Rankin*, 34 Cal. 505; *Cady v. Sanford*, 53 Vt. 632; *Seeley v. Smith*, 29 Neb. 545, 45 N. W. 922; *Stanley v. Wharton*, 9 Price, 301; *Coy v. Jones*, 30 Neb. 798, 47 N. W. 208; *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007; *Fitzgerald v. Weidenbeck*, 76 Fed. 695; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224. The

decision in the last case was put upon the ground that the statute under consideration was not penal in the international sense. Still, what is said in the opinion decidedly supports the view we have expressed. The authorities above cited are all found in the brief of counsel for the appellant, and we may say, in this connection, that it would be a work of supererogation to attempt to go beyond the reasoning and research of the most excellent briefs of counsel on both sides. They seem to have exhausted the subject. We have agreed with the counsel for appellant, and this opinion, couched in my own language, reflects, in the main, though in a less forceful and attractive form, the arguments which they have presented.

Having reached the conclusion that this is a statutory liability, and not a penalty, the statute of limitations would be that applicable to "all actions founded upon any contract or liability, expressed or implied, not in writing" (Sandel and Hill's Digest, sec. 4822; Rev. Stats., c. 91, sec. 6); for, before the forms of action were abolished, debt was the proper action for enforcing a statutory liability of the kind under consideration: *Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177; *Bullard v. Bell*, 1 Mason, 243, Fed. Cas. No. 2121; *Stockwell v. United States*, 13 Wall. 531; *Chaffee v. United States*, 18 Wall. 516; *Cross v. United States*, 1 Gall. 26, Fed. Cas. No. 3434; *Reed v. Davis*, 8 Pick. 514; *Rockwell v. State*, 11 Ohio, 130; *Strange v. Powell*, 15 Ala. 452; *Blackburn v. Baker*, 7 Port. 284; *Kelly v. Davis*, 1 Head, 71; 18 Am. & Eng. Ency. of Law, 274; *Wood on Limitations*, sec. 25.

The finding of facts by the court being correct, there is no reason for sending the cause back for retrial. The judgment of the circuit court is reversed for the error in finding the actions barred by the two years' statute of limitations, and judgment is entered here for the appellant.

CORPORATIONS.—THE STATUTORY LIABILITY OF OFFICERS of a corporation for failure to perform prescribed duties is generally considered penal in its nature: See the monographic note to *Attrill v. Huntington*, 14 Am. St. Rep. 352; *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760.

KING v. STATE.

[68 Ark. 572, 60 S. W. 951.]

MURDER—PREMEDITATION.—If one accused of murder voluntarily confesses that the deceased first attacked him with an ax, but, failing to strike him, walked away a distance of from sixty to seventy-five feet, when the accused approached him stealthily from behind, and, seizing the ax from his hands, struck him, inflicting a mortal wound, this shows sufficient premeditation and deliberation to sustain a verdict of murder in the first degree.

MURDER—PREMEDITATION—DELIBERATION.—To constitute the killing of a human being murder in the first degree, there must be a specific intent to kill formed in the mind of the slayer before the killing is done; but it is not necessary that such intent be conceived for any particular length of time before the killing, as it may be formed and deliberately executed in a very brief space of time, as in a moment, and the law fixes no time in which such intent must be formed and put in action; but leaves its existence as a fact to be determined by the jury from the evidence.

C. T. Lindsey and A. Nichols, for the appellant.

J. Davis, attorney general, and C. Jacobson, for the appellee.

572 **BATTLE, J.** John King was indicted by a grand jury of the Pulaski circuit court for murder in the first degree, committed by unlawfully, willfully, feloniously, with malice aforethought, and with deliberation and premeditation, killing and murdering William Davenport with an ax; and he pleaded not guilty, and was tried and convicted of the degree of homicide charged against him, and was sentenced to be hung.

In the trial of the defendant the wife of deceased testified, substantially, as follows: Her husband died on the 6th of February, 1900. The defendant was at her house on that day and the day before. Her husband owed him thirty cents, and paid him twenty-five cents, and still owed him the remainder. The defendant promised to return the day after this, the 6th of February, 1900, and work for her husband. He did so, and on the morning of that day went to the woods carrying an ax furnished him by the deceased to cut wood. About a half hour after this her husband left her house to hunt his mules. About an hour afterward, in the absence of her husband, the defendant returned with the ax, and inquired where her husband was. She told him, and he asked her to tell her husband that **573** he would return on to-morrow to work. In ten or fifteen minutes he left, leaving the ax. In a short time afterward she became uneasy about her husband, and looked for him, and found him within three or four hundred yards of her house,

lying in a thicket, dying. Her husband was nearly blind, but could see well enough to find his mules in the wood and identify them. The defendant had worked for him about two weeks before his death. They were apparently friendly. At the time her husband paid him her husband had four dollars, and she thinks that defendant saw them.

John Fountain testified as follows: He knew the deceased. He went with his wife to the place where he was found in a thicket, dying. He found four wounds on him. There was a "split" across the nose; a deep "gash," three or four inches long, on the back of the head, from which his brains ran out; one across his forehead and temple, and one under his right ear, and all appeared to have been made with an ax.

Bob Jones testified: He was a deputy constable. He was at the Klondyke saloon in Argenta, Arkansas, and had a conversation with the defendant, in which he (the defendant) said he knew the deceased, "and had been out to his house." Witness offered "to treat the defendant with beer, but he dashed off and got away." Did not let him know that he was an officer.

J. H. Nowlin testified: "I am constable of Big Rock township. I remember the time William Davenport was killed. I received a telephone from Bob Jones, one of my deputies, who had located a man answering the description of the one wanted for killing William Davenport. When I got over in Argenta, Arkansas, Mr. Walpole and I went in search for defendant. I saw him running and jumping fences, and I went near him and ordered him to stop. I drew a six-shooter, and told him to throw up his hands, which he did, and I arrested him. . . . I then asked him what made him kill William Davenport, and he said, if he had not killed Davenport, he would have killed him. I asked defendant how it happened. Defendant said while he was in the woods Davenport came to him, saying he wanted to see the ax. Defendant handed him the ax, which deceased took and struck at him, and that he dodged the blow, 574 and Davenport started to leave with the ax in his hand, and that he slipped up behind him, and snatched the ax out of his hand, and struck him on the back of the head, and after he fell that he struck him twice more. I asked the defendant how far the deceased (Davenport) had gotten from him with the ax before he (defendant) went after him. Defendant pointed out the distance, which was about sixty or seventy-five feet. . . . This was at the time of his arrest, and before taking him to jail. I offered the defendant no inducement to make

the confession or a statement made in jail in presence of Sam Speight. The defendant seemed to be excited, for a large crowd was gathering, and talking of lynching, and I hurried across the river, and put him in jail. This was after the defendant was first arrested, and made his statement."

Sam Speight testified: "I know the defendant and heard him make the confession to Mr. Nowlin, stating he killed William Davenport in the manner told by Mr. Nowlin, after he got to the county jail."

John King, the defendant, testified: "I am fifteen years old. I worked for Mr. Davenport two weeks. On the morning of February 6, 1900, I was at Mr. Davenport's house, and went out to cut wood with an ax, and Mr. Davenport came to where I was working. I asked him for the nickel which he owed me. He then cursed me, and asked me to let him see the ax, if it was sharp. I handed it to him, and the next thing I knew he struck at me with the ax, and I ran out from under it, and dodged around, while he still held the ax on the side of him, and took the ax away from him, and struck him on the back of the head, and he fell, and I struck him twice more. I took the ax back to the house and went away. I never told Mr. Bob Jones, the gentleman who testified on the stand, anything whatever, and never saw him before. I never told Mr. Nowlin anything about slipping up behind Mr. Davenport and snatching the ax and killing him with it. I did not tell him that I killed him (Mr. Davenport) to keep him from killing me, and that I grabbed the ax while he had it drawn on me. I was born in Arkansas, October, 1885, and was never in trouble before. I never had any malice against Mr. Davenport. I never saw any ⁵⁷⁵ money or change. Mr. Davenport gave me groceries for my work, and he owed me five cents. While in jail, the officers took me on the gallows, and put a rope around my neck. I refused to make any statements, so they swung me, and then I said what Mr. Constable Nowlin testified to awhile ago, and that was when Sam Speight, Jailer Nowlin and other officers who were unknown to me [were present]."

Nowlin and Speight testified that the confession about which they testified was made before the defendant was taken to the gallows or the rope was put around his neck; that the gallows and rope were used to elicit information about another matter, but not about the killing of Davenport.

It was proved that Davenport was killed in the county of Pulaski and state of Arkansas.

The defendant contends that this evidence was not sufficient to convict him of murder in the first degree. Is it sufficient?

In *Green v. State*, 51 Ark. 192, 10 S. W. 267, it is said: "In order to constitute the killing of a human being murder in the first degree, there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. It is not necessary, however, that the intention be conceived for any particular length of time before the killing. It may be formed and deliberately executed in a very brief space of time. If it was the conception of a moment, but the result of deliberation and premeditation, reason being on its throne, it would be sufficient. The law fixes no time in which it must be formed, but leaves its existence as a fact to be determined by the jury from the evidence": *Vivens v. State*, 11 Ark. 455; *McAdams v. State*, 25 Ark. 405; *McKenzie v. State*, 26 Ark. 339; *Fitzpatrick v. State*, 37 Ark. 256; *Casat v. State*, 40 Ark. 524; *State v. Wieners*, 66 Mo. 13; *Commonwealth v. Drum*, 58 Pa. St. 9; *People v. Majone*, 91 N. Y. 211; *Bishop's Criminal Law*, 7th ed., sec. 728; *Wharton's Criminal Law*, 9th ed., sec. 380.

In *Ex parte Brown*, 65 Ala. 446, it is said: "The law has declared, and can declare, no length of time within which the man slayer must deliberate, or premeditate, to raise the offense to the highest grade of homicide, murder in the first ⁵⁷⁶ degree. If the mind reasons about or resolves upon the act before committing it, or if the purpose be formed, no matter for how brief a period, on an event then future, or on a contingency that may happen, to use a deadly weapon, this is deliberation, premeditation; and a homicide committed pursuant thereto is murder in the first degree."

In *State v. Wieners*, 66 Mo. 27, it is said: "A purpose to kill may be conceived and deliberately executed, although but a very brief time elapse between the conception and the execution of the purpose. Deliberation does not mean brooded over, considered, reflected upon for a week, a day or an hour, but it means an intent to kill, executed by the party, not under the influence of a violent passion suddenly aroused, amounting to a temporary dethronement of reason, but in the furtherance of a formed design, to gratify a feeling of revenge or to accomplish some other unlawful purpose."

In the case before us the evidence was sufficient to prove that William Davenport, the deceased, was killed with an ax; and a part of it tended to prove that the defendant confessed

that the deceased first attacked him with an ax but failed to strike him, and then walked away, with the ax in his hand, about sixty or seventy-five feet, when he, the defendant, approached him stealthily, seized the ax, took it from his hand, and slew him. These acts were evidence of a brief premeditation and deliberation. They show that he conceived the intent to kill; determined to kill with the ax; resolved how he would get possession of the ax; and, when all this was done, deliberately proceeded to carry his plan into execution by stealthily approaching Davenport and seizing the ax and slaying him. They show a formed design, reason, self-control, premeditation and deliberation—all the essentials of murder in the first degree. This evidence, however unsatisfactory it may be to us, is sufficient to sustain the verdict of the jury in this court.

Judgment affirmed.

Bunn, C. J., dissents as to degree.

HOMICIDE—PREMEDITATION.—To constitute murder in the first degree the killing must be premeditated, but no specific length of time is required for the premeditation. There need be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind: Note to *Perugi v. State*, 76 Am. St. Rep. 876.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. STEWART.

[68 Ark. 606, 61 S. W. 169.]

RAILROADS—NEGLIGENCE IN SPEED OF TRAIN.—The running of a railway train at night at the rate of sixty miles an hour, greatly in excess of the speed required by schedule time, over a curved track where objects can be seen not more than one hundred feet, is negligence, rendering the company liable for injury to a passenger caused by the derailment of such train as the result of striking a cow.

RAILROADS—NEGLIGENCE.—The care required by railroad carriers of passengers is the highest practicable care which capable and faithful railroad men would exercise in similar circumstances. They are liable for the slightest negligence.

NEGLIGENCE—EVIDENCE—LAW OF ANOTHER STATE. If, in an action to recover for injury received through the negligence of a railroad company committed in another state, the statute law of that state is proved, parol testimony of the construction placed upon such statute by the supreme court of that state is not admissible, because it is not the best evidence.

NEGLIGENCE—EVIDENCE.—In an action to recover for personal injury received through the negligence of a railroad company, evidence that the company settled with another person injured in the same accident is incompetent, but not prejudicial, provided the company's negligence is otherwise established.

Dodge & Johnson, for the appellants.

Scott & Jones, for the appellee.

607 BUNN, C. J. The appellee, Henry H. Stewart, was in the employ of the United States government as a postal clerk, and in the performance of his duties as such was a passenger in the mail coach of defendant's passenger train, on the 5th of February, 1898, going north from Texarkana to St. Louis; and when the train reached the little town of Hematite, about thirty-five or forty miles south of St. Louis, the train was wrecked; and the appellee was injured by receiving a cut an inch long and to the bone on the left side of the head and a contusion on the left thigh, wherefrom he suffered from nervous shock, and was unable to perform his customary duties for 608 twenty or thirty days, thus losing one hundred dollars, and paid out for medical attendance thirteen dollars, and some other small amounts.

The circumstances of the wreck were substantially as follows, viz.: The train was running at the rate of fifty or sixty miles an hour, greatly in excess of the schedule time, which was thirty-three miles an hour, it being some minutes behind time, and the trainmen in charge were endeavoring to make up the time. It was about 6 o'clock A. M., which was at that season of the year dark. For the distance of a thousand or twelve hundred feet before reaching the street or public crossing at Hematite, there were curves in the railroad track forming the letter "S"—that is, two curves—and the track was in a cut from six to eight feet deep, about six feet deep toward the highway crossing and up to it. The engine struck a passing cow on the highway, and was thus thrown from the track, as were the tender and several of the coaches following, among them the mail coach in which the appellee was traveling, and was at his usual work at the time. The mail coach was turned over on its side, and the appellee was thus injured. It is in evidence that one occupying the engineer's place could see a cow only a short distance ahead, owing to the curves and the depth of the cut. It was also shown that in the night-time, when the headlight had to be depended on, on account of the curvature of the roadbed, and the consequent diversion of the rays of the

headlight, from the track, a cow could not be seen further than one hundred feet in front of the engine.

The railroad bed, the cattle-guards on either side of the highway and the wire fences leading therefrom, and the train, with its running gear and appliances, were all in perfect condition. Both the engineer and fireman were instantly killed. The statutes of Missouri regarding cattle-guards and track fencing, as affects this case, are not materially different from the laws of this state.

The main question in the case is, Were the employes of defendant guilty of negligence in operating the train at the time of the injury complained of? All the statutory signals had been given, and the stock signals required by the regulations of the company had also been given. But was all this sufficient ⁶⁰⁹ under the circumstances of this case? There was no apparent necessity to keep a watchman or guard at this crossing. Hematite is but a very small village, and it may be admitted, for the sake of the argument, that the crossing was little different from such a crossing in the country. But this immunity from keeping a watch at the crossing does not relieve railroad companies from the exercise of such care as it reasonably can use to prevent occurrences such as this one is shown to have been. Therefore, there was no necessity for an instruction on the subject of gates and watchmen. It was shown that both the engineer and firemen were experienced in their stations, and the engineer especially was regarded as one of the finest engineers on the road. Both were acquainted with this part and all parts of the road, as they had been employed for some time in running on these trains. Was it prudent or in the exercise of due care for this engineer, with his knowledge of the surroundings, to run his train at this particular point at the rate of fifty or sixty miles per hour, when only required by the schedule to run thirty-three miles per hour? The necessity of making up lost time is never so great as that of preserving human life, and even when the making up lost time approaches necessity itself, the necessary increase of speed should be on parts of a road where a strict lookout will be reasonably effective in preventing injuries, or at least the probability of injury, to persons and property.

From the evidence, the portion of the track involved was peculiarly trying to trainmen, and some things which would have greatly aided them in the successful running of the train on other portions of the track were absent at this place—a

straight track and perfectly level grade, or grade that would insure a quicker stoppage of a train than on a down grade as this was. It appears to us, as it evidently did to the jury, that, without having to resort to anything that would have rendered the service of the road to the public less effective or to the company less remunerative, a far less rate of speed would have been the proper thing in this instance. At the time of the collision the train was running at a rate of nearly a mile a minute. To run the hundred feet, which was the greatest distance ⁸¹⁰ the engineer could have observed the cow, required little more than a second of time. A strict lookout, as required by law, and the application of the most effective means known to slow up or stop the train, could not possibly avail anything. No effective alarm could have been given in that moment of time. These things should have been taken into account by the engineer.

On the subject of the degree of care necessary under such circumstances, the court gave, at the instance of the plaintiff, instruction No. 6, and, at the instance of the defendant, instructions Nos. 8 and 12, which, taken together or even separately, fairly define what is the law applicable, as held by this court in all its decisions on the subject: *Little Rock etc. Ry. Co. v. Miles*, 40 Ark. 298; 48 Am. Rep. 10; *Eureka Springs Ry. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690; *Railway Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587; *Railway Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *George v. St. Louis etc. Ry. Co.*, 34 Ark. 613. These instructions in their order are as follows:

To the plaintiff, No. 6: "Railroad companies, in the carriage of passengers, are required to use the utmost care and foresight, and are held responsible for the slightest negligence. The first and most important duty incumbent on them is to provide for the safety of their passengers. To this end they are required to provide all things necessary to their security, reasonably consistent with their business, and appropriate to the means of conveyance employed by them, and to exercise the highest degree of practicable care, diligence, and skill in the operation of their trains."

To the defendant, No. 8: "The court instructs the jury that, while the law demands the utmost care for the safety of passengers, it does not require railroad companies to exercise all the care, skill, and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible perils. The plaintiff in this case necessarily

took upon himself all the usual and ordinary perils of travel; and if they find from the evidence that defendant had exercised all the care, skill, and diligence required by law, as defined in these instructions, and that nevertheless the accident occurred, the defendant would not be responsible therefor, and your verdict should be for defendant." And—

No. 12: "The care required by railroad carriers has been defined to be the highest practicable care which capable and faithful railroad men would exercise in similar circumstances."

It was objected by the defendant that, having proved what was the statute law of Missouri on the subject of cattle-guards and fencing and the liability and immunity therein declared, the court refused to permit the witness Ewing to testify as to the construction put upon said statute by the supreme court of that state. We see no error in this refusal. The best evidence of what the supreme court of Missouri has said on the subject is the report of its decisions, which are easily accessible, even admitting this is a matter of proof at all.

In the course of the examination of witnesses, one witness who, we infer, had been injured in the same wreck, or claimed to have been, was asked if the railroad had settled with him, to which he answered in the affirmative. To the asking of and the answer to this question, the defendant objected, but the court overruled its objection. There was error in this, but in view of the particular point at issue and the proof sustaining the plaintiff's contention—negligence—and for other reasons, the error is not a reversible error.

There is some question as to the amount of damages. Further than the loss of wages by the loss of time, the medical bill, etc., this court has no certain evidence in the case. Pain or suffering, as elements of damage, are uncertain quantities, both for the jury and the court. We will not disturb the verdict in this particular case.

Affirmed.

RAILROADS.—IN CARRYING PASSENGERS. railroads are held to the highest degree of care, diligence, and skill consistent with such means of transportation under the circumstances: *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477, 59 Am. St. Rep. 910, 69 N. W. 175.

RAILROADS—EXCESSIVE SPEED OF NIGHT TRAIN.—It is negligence in a railroad company to run its trains in the night-time at such rate of speed that it is impossible, by the use of ordinary means and appliances, to stop a train within the distance in which stock upon the track can be seen by the aid of the headlight of

the engine. If injury results from such negligence, the company is liable to the owner of the stock killed or injured: *Alabama Midland Ry. Co. v. McGill*, 121 Ala. 220, 77 Am. St. Rep. 52, 25 South. 731.

RAILROADS.—ON THE LIABILITY FOR RUNNING TRAINS at a high rate of speed, in general, see *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939.

EVIDENCE.—THE CONSTRUCTION OF A STATUTE of another state may be shown by the testimony of a lawyer practicing there: *Bollinger v. Gallagher*, 163 Pa. St. 245, 43 Am. St. Rep. 791, 29 Atl. 751.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

**ARGONAUT MINING COMPANY v. KENNEDY MINING
AND MILLING COMPANY.**

[131 Cal. 15, 68 Pac. 148.]

MINES.—THE LOCATOR OF A LODE CLAIM UNDER THE UNITED STATES MINING LAW OF 1866, who had the land surveyed, and who paid therefor and applied for a patent prior to the mining act of 1872, is entitled to all the rights which attached to his location under the act of 1866, though the land was not patented until after the passage of the act of 1872. He is also entitled to all additional rights inuring to such a location conferred upon him by the act of 1872.

MINES—QUARTZ CLAIMS—PRESUMPTION AGAINST FORFEITURE.—The rights of locators of lode claims, under former laws, were expressly confirmed to them by the United States mining act of 1872, and, as the presumption against forfeiture is very strong, that act will not be construed to work a forfeiture of rights secured to the owners of lode claims located under the United States mining law of 1866.

MINES—QUARTZ CLAIMS—EXTRALATERAL RIGHTS.—PARALLEL END LINES were not required in locations of lode claims, by the United States mining law of 1866, to insure extralateral rights, or at all. Such rights were specifically given by that act. Hence, the end lines of a lode claim, located under that act, though patented under the United States mining act of 1872, need not be parallel to insure extralateral rights to the locator.

MINES—QUARTZ CLAIMS—RIGHT TO FOLLOW DIP THOUGH END LINES ARE NOT PARALLEL.—The fact that the end lines of a claim located under the United States mining law of 1866 are not parallel, though the patent was not issued until after the passage of the United States mining act of 1872, does not deprive the owner of such claim of the right to follow his lode on the dip beyond the side lines of the surface location.

MINES—QUARTZ CLAIMS—DIVERGENCE OF END LINES—MEASURE OF EXTRALATERAL RIGHTS.—If a lode claim was patented under the United States mining act of 1872, but the location was made under the United States mining law of 1866, and the patent granted a certain number of feet of the lode throughout its entire depth, confining extralateral rights to that part of the lode lying between vertical planes drawn downward through the ends of the survey at the surface, which survey has end lines diverging in the direction of the dip of the lode, the extralateral rights of the patentee on the dip cannot exceed the stated number of feet on the lode at any depth, but he is entitled to all ore of the lode at any depth which lies between vertical planes drawn at right angles to its general course on the surface.

Action for damages. There was a judgment for the plaintiff and the defendant appealed.

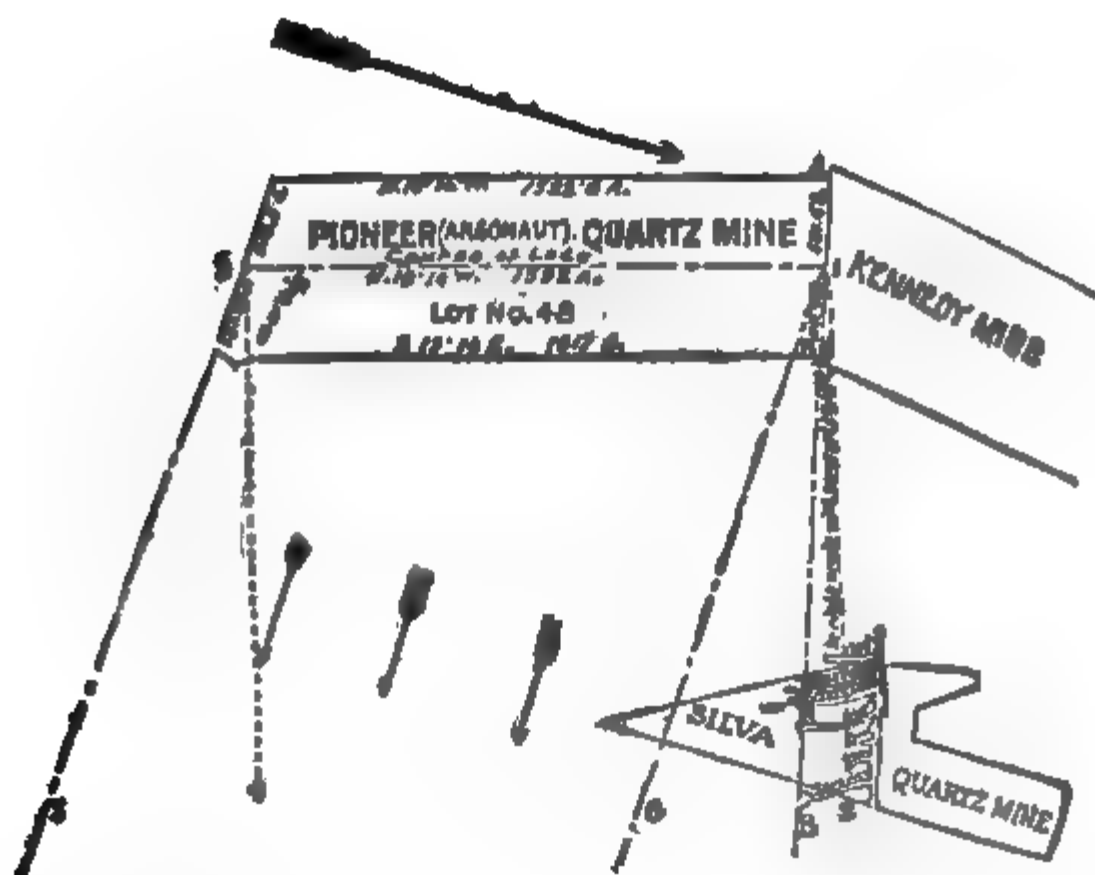
John M. Wright and Byron Waters, for the appellant.

Lindley & Eickhoff, William J. McGee, and F. J. Solinsky, for the respondent.

17 TEMPLE, J. This is an action for damages for the value of ore alleged to have been taken by defendant from plaintiff's mine, situate in Amador county. The defendant denies taking any ore, or gold-bearing rock, from plaintiff's mine, and avers that defendant is the owner of the mine from which the rock was taken.

The cause was submitted in the trial court upon an agreed statement of facts, each party having the right to object to the relevancy, competency, and materiality of any part of it. Certain objections to evidence were made by the appellant, which **18** were overruled by the court, and the main argument here has been in regard to these rulings. Much of the evidence was objected to simply upon the ground of immateriality. All that I deem it necessary to say in regard to such rulings is that, admitting that the trial court erred, as I am inclined to think it did, defendant has suffered no harm. The question of law upon which the case must turn is not changed or affected by receiving this immaterial evidence.

The controversy is indicated by the following diagram:



The plaintiff owns the Pioneer quartz mine, the defendant owns the Kennedy mine and the Silva mine. All three mines had passed to patent before the ore was taken out by defendant. The ore was taken under the Silva location, and within its exterior limits carried vertically down. It was taken from the discovery lode of the Pioneer location, which is the only lode which has its apex within that location. The lode enters that location near the middle point of the southern end line, and runs northerly through the location in a direction practically parallel to the side lines, through the center of the northern end line. In fact, save that the end lines are not parallel, the ¹⁰ location and the lode are the ideals upon which the rules and regulations of miners and the laws of Congress seem to have been based.

The defendant does not assert any right to the ore in dispute by virtue of its ownership of the Kennedy mine, and nothing further need be said about it. Defendant asserts title to the ore by reason of its ownership of the Silva ground, under what counsel call the common-law right to everything beneath the surface. It admits plaintiff's ownership of the Pioneer mine, and that the lode has its apex, as stated, within its surface location, but denies that the quartz taken by it from that

lode is within that location. This is asserted, as I understand the contention, upon two grounds: 1. Defendant contends that because of nonparallelism of the end lines of the Pioneer, it carries no extralateral rights; and 2. If the court can, as matter of law, construct for it parallel end lines, the southerly end line being the base line from which the location was projected, the parallel will be made by extending the northern end line in a direction parallel to the direction of the southerly end line.

The dip of the lode is easterly at an angle of about sixty degrees from the plane of horizon, and the end lines of the Pioneer diverge in that direction to the extent of about fourteen degrees forty-five minutes. The ore was taken out directly beneath the Silva surface location at depths varying from fourteen hundred to two thousand feet beneath the surface. The Silva location is more than nine hundred feet easterly from the easterly line of the Pioneer location.

The Pioneer was located, as the patent shows, under the law of 1866. The application for a patent was filed January 13, 1871. On the twenty-third day of February, 1872, the Pioneer entered and paid for its mine, and the patent is dated August 12, 1872. The act to promote the development of the mining resources of the United States was passed May 10, 1872.

For reasons which will appear as this opinion proceeds, I think plaintiff is entitled to all the rights which would attach to such a location under the law of 1866, and to any additional rights which inured to such locations under the act of 1872.

Among the contentions of the respondent is this: "Although the end lines were not required to be parallel under the act of 1866, yet if by any process of reasoning any limitation upon the extralateral right was imposed upon the locators' title by reason of the divergence of end lines, such limitation was removed by the act of May 10, 1872, which granted to owners of locations theretofore made the right to pursue the vein on its downward course, between the end line planes of such location as it existed."

This proposition is based upon the language of the first proviso in section 3 of the law of 1872. After stating that the locators shall have certain lodes throughout their entire depth, although they may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines, it proceeds: "Provided that their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward

as aforesaid through the end lines of their location so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges." Then follows another proviso, that no locator, by reason of his right to the dip of his lode, shall be authorized to enter upon the surface of a claim owned by another.

These provisos grant no rights additional to those already given, nor do they purport to do so. They are both express limitations upon rights already given. The proviso does not confer ownership to all within those planes, but says, in effect, that no locator may pass beyond them. No rule of construction with which I am familiar would authorize or require a different reading of the section, especially in the face of the evident policy to strictly limit the rights of all locators as to length along the vein or lode.

We have many graphic accounts of the rush of gold hunters to California in 1849. The river banks and gulches were suddenly crowded with eager and earnest men anxious to dig for gold. There was no law by which anyone could secure to himself any portion of the rich placers. In the absence of regulation, the strongest or most unscrupulous would get the lion's share. The miners, of necessity, made and enforced their own laws. Some regulations as to mining claims sprung into existence naturally, in fact necessarily: 1. So far as possible, each ²¹ person was given a specified portion of the ground which he could mine; 2. The allotment to each was so limited that there should be no monopoly. So far as possible all should have an equal chance. The right of the first possessor was preferred, but no matter was considered more important than the limitation upon the extent of the claims; and 3. As a corollary from these two cardinal rules, the third follows: That each claimant shall mark plainly upon the surface of the earth the boundaries of his claim, that others may locate claims without interfering with him.

These essential rules have been the basis of most of the rules and regulations of miners, and have been recognized in every mining district on the Pacific coast, and in all attempts by legislation, territorial, state, or national, to regulate mining locations. Indeed, it may be said that the purpose of all these laws and regulations is to secure these ends.

These views are, as I think, expressed by Judge Field in the celebrated Eureka Case, 4 Saw. 302, Fed. Cas. No. 4548. The locations there considered were made under the law of 1866, and one of the questions to be decided was whether the defendant

was entitled to its allotted distance along the vein, although in its strike the vein passed beyond its exterior surface lines. There was no contention based upon diverging end lines, and there could not have been; for the ore body in dispute was within planes passing through the end lines of the Champion location, which belonged to plaintiff, and was not within such planes passing through the end lines of any location under which defendant claimed. Defendant, on this point, simply contended that it had the oldest location, and under the law of 1866 had a right to the number of feet on the lode called for in its location, although it extended within the junior locations owned by plaintiff. It was held that defendant could not follow the lode on its strike through any line of its surface location. In reaching this conclusion the court emphasized the invariable and inexorable policy to limit the location along the course of the vein to the quantity located, and to the line of the surface location, and to permit an extension of right only on the dip.

Bearing, then, in mind that the argument was to show that under the law of 1866 the locator could not, for the purpose ²²⁰ of securing his length of lode, pass the lines of his surface location, we may be instructed by the decision. It is first said the locations under the law of 1866 are not invalid because the end lines are not parallel. The law did not require such parallelism, and the requirement in the law of 1872 was merely directory and no consequence attached to a deviation from the direction. "Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations as the length of the lode."

The locator was limited to his number of feet on the lode throughout its entire depth, and the court realized that the only possible mode of so limiting the right was by parallel end lines. The miners seem to have regarded a lode as something like a plank. All a locator had to do was to measure off his distance upon it, and then make a "square cut" at the end. Judge Field's idea that the planes of the end "cuts" must be parallel in order to limit the locator at all depths to his number of feet claimed upon the surface is further shown. He says: "It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that

distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules.

"Similar rules have been adopted in numerous mining districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been adopted in any mining district in California or Nevada. And the construction is one which the law would require in the absence of any construction by miners. If, for instance, the state were to-day to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width, cut through the block. No other mode of division would carry out the grant.

"The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein with its dips, angles, and variations, to any depth, although it may enter land adjoining—that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land, taken up in connection with a linear location on the ledge or lode is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles, and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course, or strike, as it is termed, of the ledge or lode. Lines drawn vertically down

through the ledge or lode, at right angles with a line representing this general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode, within which he is permitted to work, and out of which he cannot pass."

Judge Field here was endeavoring to show that the locator was limited under the law of 1866 to the specified number of linear feet on the lode throughout its entire depth. The extent of his right could be measured by the feet on the surface. The statement that the requirement in the law of 1872 that the end lines shall be parallel was only directory was overruled in *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, but that ²⁴ the limitation upon the line or distance on the lode continues throughout its entire depth has always been recognized. And, indeed, it seems obvious that the opposite contention could not be thought of. A proposed rule may be tested by inquiring what may be done with it. Suppose the divergence here had been one hundred and fifty degrees instead of fifteen, the dip being at a small angle from the plane of the horizon. The statutory limitation upon the length which could be taken on the lode would be a farce, even were the ledge the ideal ledge of miners. The Pioneer would soon have extended itself to the entire length of the lode.

I think the law of 1872, instead of extending the rights of locators under the law of 1866 along the lode, expressly limits them in that respect to the rights they had under the previous laws. Section 2 provides: "Mining claims upon veins or lodes . . . heretofore located shall be governed, as to length on the vein or lode, by the customs, regulations, and laws in force at the date of their location."

These words themselves, in my opinion, are sufficient to support the declaration of the court in the *Eureka* case. Speaking of the limitations provided in section 3 of the act of 1872, which I have noticed, of lodes to planes through the end lines, "the act in terms annexes these conditions to the possession not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that in the opinion of the legislature no change was made in the rights of the previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and

made it applicable to all veins or lodes found within the surface lines."

This proposition is substantially reiterated in *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, and in many other cases, including the latest to which our attention has been called—*Walrath v. Champion Min. Co.*, 171 U. S. 293, 18 Sup. Ct. Rep. 909.

It remains but to add on this point that the patent under which plaintiff claims only grants of the discovery lode fifteen hundred and eighty-nine and ninety-four one-hundredths linear ~~25~~ feet "of the said Pioneer quartz vein, lode, ledge, or deposit, as hereinbefore described, throughout its entire depth; provided, that the right of possession to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction," etc. And in the habendum is added as a condition, "that the grant hereby made is restricted to the land hereinbefore described as lot No. forty-eight (48), with fifteen hundred and eighty-nine and 94-100 linear feet of the Pioneer quartz vein, lode, ledge, or deposit throughout its entire depth," etc.

I think it clear that there is no attempt here to convey all within planes passing through the end lines, if such planes would at any depth include more than the amount specifically defined on the strike of the lode.

Upon this conclusion, that a patent to a location with end lines diverging in the direction of the dip does not convey all within those planes, but at the most not more than the stated number of feet on the lode, at any given depth, the appellant contends that such patent grants no extralateral rights at all. Such would be the law if the location were under the law of 1872, and as the patent to the Pioneer was issued after that law took effect counsel contends that it is subject to its requirement that the end lines must be parallel or the patentee has no extralateral rights. Another objection is that there is no description of the segment of the lode which extends beyond the surface location, and no grant can be effectual which does not define the thing granted.

Parallel end lines were not required in locations by the law of 1866, and yet extralateral rights were specifically given. The act refers to rules and regulations made by miners, but it is not said that any such rule required parallel end lines. It is

claimed in argument that such was, in general, the custom of miners, but it is not even contended that there was such a custom in Amador county, and all the patents shown in this case lack such parallelism.

I think it would have been competent for Congress in the law of 1872 to have required parties who had equitable rights ²⁶ to patents to cause such adjustments of their surface lines as would indicate and define their extralateral rights—in other words, to have made their end lines parallel before a patent would issue, on pain of losing all extralateral rights. There are no such provisions in the act of 1872, but the rights of locators under former laws are expressly confirmed to them.

The presumption is very strong against forfeiture, and against such construction of any law as would work a forfeiture. The language of an act, to have such effect, must be very plain, or the court will, if possible, give a construction to it that would not have that effect.

It is admitted that such extralateral rights are recognized and asserted in the Eureka case, and I think in the language used by Judge Field in *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177. The "Horse Shoe case" is equally clear upon this matter: "Under the act of 1866 (14 Stats. at Large, 251), parallelism in end lines of a surface location was not required, but where a location has been made since the act of 1872 such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes down through the side lines." This very clearly implies that a locator under the act of 1866 has such right, although his end lines are not parallel. In many other cases the same thing is implied: *Del Monte Min. etc. Co. v. Last Chance Min. etc. Co.*, 171 U. S. 55, 18 Sup. Ct. Rep. 894; *Walrath v. Champion Min. Co.*, 63 Fed. 552, 171 U. S. 293, 18 Sup. Ct. Rep. 909.

We come, then, to the other phase of the question: Can it be determined as matter of law, from the patent or the complaint, what segment of the dip, if any, the plaintiff acquired by his location or patent? It is admitted, or rather contended, by counsel on both sides that the court cannot construct end lines. If the court is to adjudge that plaintiff is entitled to follow the dip beyond his lines, it must find some mode of limiting the right along the vein, and that limitation must result as matter of law from the patent, when the necessary facts are shown as to the property it attempts to convey—that is, as to the course and dip of the lode.

The contention of the parties in regard to this matter is shown upon the diagram. Of course, it is understood that plaintiff ²⁷ contends for all included between planes drawn through its end lines, although they diverge and would inevitably extend his rights along the strike. While defendant contends that because of such divergence plaintiff has no extralateral rights. But each party has an alternative theory, in case its primary contention is not sustained. Plaintiff says, if planes through its end lines do not control, then planes are indicated between lines perpendicular to the general course of the lode.

Defendant's alternative is that, as the southern end line constitutes the initial line in the survey, it necessarily follows from the requirement of parallel end planes that the northern end line shall be parallel to it. That by locating and fixing the southern end line first the northern end line was thereby also definitely and finally located. These theories are shown in the diagram: 3-5 is the southern end line continued; 1-6 is a parallel line from the northern end of the lode. This shows defendant's theory. These lines would give the ore in dispute to defendant.

The lines suggested by plaintiff are 1-2 and 3-4. These are at right angles to the general course of the lode, and planes descending through them would give the ore to plaintiff. The line B-B' is the northern end line continued, and between that line and 3-5 is plaintiff's first contention, which we have considered.

I am not referred to any authorities which support the contention of appellant that the southern end line must be considered as the base from which the surface form of the location was projected. As stated, the argument is that having been first located it followed, as matter of law, that the other end line must be in the same direction, in order that end lines may parallel. But the location was made, surveyed, the land paid for, and application made for the patent before the law of 1872 was enacted. The act of 1866 did not require parallel end lines to insure extralateral rights, or at all. There was, therefore, no implication that the second end line should be parallel to that first established. It was not an absolute necessity that by a naked description one end line should be described before the other. A side having been located, one sentence could have created both end lines from each end and at right angles to ²⁸ the side line in a certain direction. No such general rule, therefore, applicable to all cases could be adopted. Planes so constructed could not result as matter of law.

Planes through the lode at the end lines of the location at right angles to the general course would impose the required limitation upon the rights of the locator along the lode. The rule that they must be so constructed would be universally applicable—at least theoretically. The congressional system for the sale of mineral lands is founded upon the proposition that the course of the lode can be traced. That nature, in her infinite variety, does not always so deposit her mineral gifts is unfortunate; but I think in construing the law we may have regard to the views of the law-makers in regard to its subject, however crude and inadequate such views were. The law of 1866 is said to have been but a crystallization of the rules and customs of the miners. The first lodes worked were, I think, nearly in a uniform direction. The individual claims were short, usually two hundred feet. Under such circumstances it was not difficult to appropriate to each his number of feet on the dip at any depth. In California mines such claims were very often consolidated and disputes avoided. Often, as on the Comstock lode, the miners agreed upon a base line from which the surface forms of locations were projected, or to which they were adjusted. This would result in parallel end lines.

The general practice, I think, was to have their claims bounded, so far as the lode was concerned, by parallel end lines, whatever might be the form of their surface location. In fact, they adopted the idea put forth by Judge Field in the Eureka case. Their rights on the lode were limited to planes at the limit of their right to the lode on the surface, at right angles to the general course of the lode.

The Eureka case is perhaps the only express authority for this proposition, but I do not find, as claimed by the learned counsel for the appellant, that it has been repudiated by later cases. On the contrary, these cases which imply extralateral rights when the end lines are not parallel seem to concede this rule. I am unable to understand *Walrath v. Champion Min. Co.*, 171 U. S. 293, 18 Sup. Ct. Rep. 909, upon any other theory. There was liberty of surface form under the act of 1866, but the law strictly confined ²⁹ the right on the vein below the surface. This accords both with the Eureka Case, 4 Saw. 302, Fed. Cas. No. 4548, and the Flagstaff case (*Mining Co. v. Tarbett*, 98 U. S. 463). In the latter case it was said: "But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course to any depth below the surface, although laterally its inclination shall carry it ever so

far from a perpendicular." But rights on the strike were limited by the surface lines of the location under both laws. Judge Field was familiar with the mining customs and laws. I have no doubt he expressed in the Eureka case what had been and was the universal understanding and practice of miners. The rule there declared seems to me reasonable, and, in fact, the only one that can be applied to such patents issued under locations made before the law of 1872 came into existence. If, as suggested, the officers of the land office usually adjust and make the end lines of locations parallel before issuing the patent, such patents, when issued, will be conclusive evidence that such also was the location.

A case has been cited in which the end lines of the location converge in the direction of the dip: Carson City etc. Min. Co. v. North Star Min. Co., 73 Fed. 597. It was held that the locator had extralateral rights because the conveyance would give less, rather than more, on the dip of the vein. This may be all right, as it seems to me, however, not because the patent carries less, rather than more, than would pass had the end lines been parallel, but because that which is granted is described so that it can be definitely located. Under the force of the restriction contained in section 3 of the law of 1872, the locator could not take beyond planes through his end lines. This confined him within well-defined boundaries to less on the dip below the surface than he had upon the surface. If this was an attempt to construe the act of 1872, the logic might be questioned. That act, as construed, does not grant extralateral rights because the end lines are parallel or converge toward the dip of the vein, but if they are parallel. The location there under consideration was made under the act of 1866, and carries extralateral rights because the extent of such rights are definitely described. At least, such was the fact, and no other reason was required. It was, therefore, not necessary in that case to consider the point here under debate.

⁸⁰ If this position be correct, the complaint does definitely describe the segment of the lode from which the ore was taken.

The judgment is affirmed.

McFarland, J., Garoutte, J., Henshaw, J., Harrison, J., and Beatty, C. J., concurred.

MINES—LODE CLAIMS—EXTRALATERAL RIGHTS.—A patentee of a mining location has the right, respecting any lode or lodes the apex of which is within the lines of his location, to follow such lode or lodes downward in their dip beyond the side lines of his

location, though in so doing he goes beyond the vertical extension of such lines toward the center of the earth: See the monographic note to *Catron v. Old*, 58 Am. St. Rep. 265, showing what patents for mineral land include, and discussing extralateral rights. A miner who has the apex of an ore vein in his location is entitled to the ore vein, and he has as much length thereof on the strike, no matter how deep he may go on the dip, as he has length of apex within his surface lines, whether such apex reaches the surface or is found beneath, within the planes of his exterior boundary lines extending downward perpendicularly: *Butte etc. Min. Co. v. Societe etc. de Lexington*, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111.

MINES—LODE CLAIMS—END LINES—PARALLELISM AND DIVERGENCE—EXTRALATERAL RIGHTS.—Parallel end lines on lode claims were not required by the United States mining law of 1866, but were expressly required by the United States mining statute of 1872: See the extended note to *Catron v. Old*, 58 Am. St. Rep. 268, 277, 279, discussing patents under these two acts, and the effect of lines which converge on the one side and diverge on the other. Under the act of 1866 the patentee was entitled to extralateral rights to the extent that he might follow the dip of his lode, though in so doing he passed beyond a plane drawn vertically beneath his side lines, but he could not pursue the lode beyond his end lines: Note to *Catron v. Old*, 58 Am. St. Rep. 278.

ENOS v. SNYDER.

[181 Cal. 68, 63 Pac. 170.]

WILLS—DISPOSITION OF ONE'S OWN DEAD BODY.—A man cannot by will dispose of his dead body, for there is no property in it, and it does not form a part of his estate.

CEMETERIES—RIGHT OF BURIAL—WHO HAS.—The right of burial of a deceased wife or husband belongs to the surviving spouse, and in other cases to the next of kin, being present and having the ability to perform the service; and courts have the power to protect the exercise of such right.

CEMETERIES—RIGHT OF BURIAL.—AN EXECUTOR OR ADMINISTRATOR is not entitled as such to bury the body of his decedent, and is not entitled to its possession for that purpose, as against those who do have a right to its custody for the purpose of burial.

CEMETERIES—RIGHT OF BURIAL—ENFORCEMENT OF, BY ACTION.—The fact that a penalty for not burying a dead body is also imposed upon the one whose duty it is to bury it does not affect the right of custody which the law gives, and a clear enactment of substantive law establishing such a right may be considered and enforced in a civil action, though it is found in the Penal Code.

CEMETERIES—RIGHT OF BURIAL—RELATIVES—CLAIMANTS BY WILL.—If a man dies, his surviving wife and daughter have the right to the possession of his body, for the purpose of burying it, as against others who claim that right under the provisions of a will.

Lippitt & Lippitt and Myrick & Deering, for the appellants.

Haven & Haven, for the respondents.

McFARLAND, J. John S. Enos died in Sonoma county on March 30, 1898. The plaintiff Susie T. Enos is his surviving wife, and the plaintiff Gertrude Willis is his daughter. For several years next before his death the deceased had not lived with his wife, but during that time lived at the residence of the defendant Rachael Jane Snyder, where he died. He left a will which contained a direction that the manner, time, and place of his burial should be "according to the wishes and directions of Mrs. R. J. Snyder," the said defendant. After his death the plaintiffs herein made demand of defendant Snyder for possession of his body for the purpose of burying the same, and the demand was refused. Thereupon this action was commenced against Mrs. Snyder for a judgment declaring that plaintiffs are entitled to the possession of the dead body of the deceased for the purpose of burial, enjoining defendant from proceeding with the burial of said body and directing her to give to plaintiffs the possession thereof.

Defendant Snyder answered, setting up the clause in the will above referred to, and also verbal statements to the same effect made by the deceased before his death. Afterward E. S. Lippitt, the executor named in the will, was, on his own application, made a party defendant, and he filed an answer averring substantially the things set up in the answer of defendant Snyder. Demurrers to both answers were sustained, and judgment was entered for plaintiffs substantially as prayed for in the complaint. From this judgment defendants appeal. It is admitted that the record presents the sole question involved in the case, namely, Under the law of this state, did the respondents, as next of kin, have the right to the possession of the body of the deceased for the purpose of burying it, as against the appellants, who claim that right under the will?

The general English and American authorities on the subject are not very satisfactory—at least, as to a contest like the one here involved between the next of kin and persons claiming under a will. It is quite well established, however, by those authorities that, in the absence of statutory provisions, there is no property in a dead body, that it is not part of the estate of the deceased person, and that a man cannot by will dispose of that which after his death will be his corpse. There are some expressions in some of the authorities cited by appellants

to the effect that the right of burial is in the next of kin, "in the absence of any testamentary disposition"; but they were not cases in which the right of testamentary disposition was involved. The case which is most directly in point here is *Williams v. Williams*, L. R. 20 Ch. Div. 659. It is a recent case (1882) and expresses the law of England on the subject. In that case the deceased had by his will directed that after his death "his body should be given to his friend Eliza Williams, to be dealt with by her in such manner as he had directed to be done in a private letter to her." The body, however, was buried⁷⁰ in a certain cemetery "by the direction of his widow and one of his sons"; but afterward Eliza Williams succeeded in removing it from the cemetery, and, having disposed of it in accordance with the direction of the will, she brought the action against the executors to recover the amount of the expenses which she had incurred in so doing. Kay, J., in his opinion, after referring to certain cases, says: "It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of. I asked for any authority in conflict with these cases, but none was produced. I have referred to the books of the greatest authority on the question, and I believe there is no authority in the least degree in conflict with these cases. It follows that the direction in this codicil to the executors to deliver over the body to Miss Williams, who is not one of the executors, is a direction which, in point of law, could not be enforced, and was void." The current of American authorities, although there is some conflict, is to the same effect: *Griffith v. Charlotte etc. R. R. Co.*, 23 S. C. 25, 55 Am. Rep. 1, and cases there cited; *In re Wong Yung Quy*, 6 Saw. 449, 2 Fed. 624; *Guthrie v. Weaver*, 1 Mo. App. 136. In *O'Donnell v. Slack*, 123 Cal. 285, 55 Pac. 906, the point was not involved.

But as some one must, of necessity, bury the dead, and must have the temporary possession of the dead body for that purpose, in the few cases where there has been any question on the subject equity has been invoked, and courts of equity have assumed jurisdiction and have given the necessary remedies; and it has been generally declared that the right of burial of a deceased wife or husband belongs to the surviving spouse, and in other cases to the next of kin being present and having the ability to perform the service: *Durell v. Hayward*, 9 Gray, 249;

Fox v. Gordon, 16 Phila. 185; **Larson v. Chase**, 47 Minn. 307, 28. Am. St. Rep. 370, 50 N. W. 238; **Foley v. Phelps**, 1 N. Y. App. Div. 551, 37 N. Y. Supp. 471; **Wynkoop v. Wynkoop**, 42 Pa. St. 293, 82 Am. Dec. 506; **Matter of Widening Beekman St.**, 4 Bradf. 503.

The appellant Lippitt in his answer bases his alleged right on the directions given by the deceased in his will and verbally, ⁷¹ and not upon his authority as executor independent of such directions, and the arguments of counsel for appellants rest mainly on that basis; but there is in their briefs some shadow of contention that an executor or administrator has, by mere virtue of his office, the right to bury the body and to the possession of it for that purpose. There are expressions to that effect in the English books and particularly in the older ones, and they may also be found in some American authorities; but the current of American authorities is the otherway. Those expressions are found generally in cases where there was no contest between executors and next of kin—as in **Williams v. Williams**, L. R. 20 Ch. Div. 659, where the body had been buried by the executors by the direction of the next of kin. Of course, it is generally provided by statute—as in this state by section 1643 of the Code of Civil Procedure—that executors or administrators must pay “funeral expenses”; but it has certainly been the custom in this country for the next of kin, and not the executor or administrator, to have the custody of the dead body before the funeral, and to bury it. Indeed, under our probate system, it cannot be determined who the executor or administrator is until after the appropriate time for the funeral has elapsed, and the burial of the dead body is not to be found in the statutory enumeration of the rights and duties of executors and administrators. In *American and English Encyclopedia of Law*, volume 8, page 837, it is said in the text as follows: “In England it has been held that an executor has the right to the custody and possession of the body of his decedent until it is properly buried; but this doctrine has no support in the United States”; and the cases cited support the text. In **Renihan v. Wright**, 125 Ind. 536, 21 Am. St. Rep. 249, 25 N. E. 822, the court, after an elaborate discussion of the subject and review of the authorities, say: “Our conclusion is that the custody of the corpse and the right of burial do not belong to the executor or administrator, but to the next of kin, and that the courts of this state possess the power to protect such next of kin in the exercise of such rights.”

We have considered the subject as presented in the general authorities because appellants contend that there are no statutory provisions here which are determinative of the question ⁷² involved, but we think that our statutory law does definitely settle the question against appellant's contention. Section 292 of the Penal Code provides that: "The duty of burying the body of the deceased person devolves upon the person hereinafter mentioned"; then follow four subdivisions of the section. Subdivision 1 provides that in the case of the death of a married woman the duty of burial devolves on the husband; and subdivision 2 is as follows: "If the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age and within this state, and possessed of sufficient means to defray the necessary expenses"; and section 294 provides that: "The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purposes of burying it." It is also provided in another section that if the person upon whom the duty of burial is imposed neglects to perform it in a reasonable time he is guilty of a misdemeanor, and is also liable in a civil action to the person who does perform it in treble the expense incurred. These provisions are very clear and explicit; but appellants contend that they should not be considered in a civil action because they are in the Penal Code. This position is not tenable. We have here a code system which is for convenience and partial classification divided into four codes, to each of which a name is given; but they are inseparably interwoven with each other, and no one of them is complete in itself, or absolutely confined to a particular subject. Therefore, clear enactments of substantive law establishing rights—like section 294—are not to be held inoperative because found in any particular code. If a provision in one code were in conflict with a provision on the same subject in another code, perhaps a consideration of the general purpose of each of the codes might afford some aid in solving the difficulty; but there is no such difficulty here, for there is no provision in any of the other codes touching the question here involved. The fact that a penalty for not burying a dead body is also imposed upon the one whose duty it is to bury it does not affect the right of custody which the law gives. If the duty and the right had been declared in some other code, and the Penal Code had merely provided the ⁷² penalty, there

would be, we suppose, no objection to the appropriateness of the legislation; but there is no reason in law why any part of this legislation is invalid because found in the Penal Code instead of one of the others. It would hardly be contended that the provision about liability in a "civil action" is inoperative because found in the Penal Code. The subject is one peculiarly appropriate for legislative direction; and it may be assumed that the legislature has looked upon the provisions of the code above cited as sufficiently expressive of the legislative intent.

The judgment is affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

DEAD HUMAN BODIES—DISPOSITION OF BY WILL—RIGHT OF BURIAL.—It has been held that a person may, by will, absolutely determine what disposition shall be made of his remains; but when no such disposition is made of the dead body of a human being, the surviving relatives, and not the executor or administrator, have the right to the custody thereof for the purpose of burial, and any interference with such right is an actionable wrong. The right of burial of a deceased husband or wife belongs to the surviving spouse, and in other cases to the next of kin: See the monographic note to *Keyes v. Konkell*, 75 Am. St. Rep. 425, on rights in and to dead bodies, and the remedies for their enforcement; and compare the note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 184. That a dead body is not a subject of property, see *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; and the monographic note to *Wynkoop v. Wynkoop*, 82 Am. Dec. 513, on rights and duties of relatives and others respecting bodies of the dead.

McPIKE v. HEATON.

[131 Cal. 109, 63 Pac. 179.]

COVENANT AGAINST ENCUMBRANCES EMBRACES TAXES.—The covenant against encumbrances implied from a deed of grant embraces taxes.

COVENANT AGAINST ENCUMBRANCES DOES NOT RUN WITH LAND.—A covenant, whether express or implied, that land granted is free from encumbrances, does not run with the land, or pass to an assignee or succeeding grantee.

COVENANT AGAINST TAXES IS PERSONAL AND DOES NOT RUN WITH THE LAND.—An implied covenant in a grant that the land is free from taxes is personal, and does not run with the land.

TAXES—PERSONAL OBLIGATION OF OWNER—PAYMENT OF TAXES—HOW ENFORCED.—There is no personal

obligation upon the owner of land for the taxes levied against it and made a lien thereon, and the payment of such taxes can be enforced only by a sale of the land in the mode prescribed by statute.

TAXES—RECOVERY OF AMOUNT PAID FOR—IMPLIED COVENANT.—A SUCCEEDING GRANTEE who has paid taxes which were a lien on the land preceding the date of the first grant cannot maintain an action for the amount so paid, against the first grantor, upon the covenant implied from his deed of grant that the land was free of taxes.

Davis & Hill and Warren Heaton, for the appellant.

Dunne & McPike, for the respondents.

¹¹⁰ HARRISON, J. The defendant was the owner of the undivided half of a certain tract of land in Alameda county on the first Monday of March, 1897, and for many years prior thereto, and on March 24, 1897, he made a grant, bargain, and sale deed of his interest in the land to one Jackson. On the next day Jackson conveyed the land to the plaintiffs by a grant, bargain, and sale deed, and the plaintiffs have since remained the owners thereof. The land was assessed to the defendant for the purposes of revenue for the fiscal year commencing July 1, 1897, and taxes were levied thereon for that year by the city of Oakland and the county of Alameda, and on November 29, 1897, the plaintiffs, for the purpose of removing the lien of these taxes from said land, paid the same to the proper officers, amounting to four hundred and twenty-four dollars and eighty-three cents. The present action is brought to recover from the defendant the amount thus paid. Judgment was rendered in favor of the plaintiffs, and the defendant has appealed.

By section 3718 of the Political Code the taxes which were paid by the plaintiffs were a lien upon the land, and attached thereto as of the first Monday of March of that year, and the covenant implied from the defendant's grant of the land, that ¹¹¹ the estate conveyed by him was at the time of such conveyance free from all encumbrances done, made, or suffered by him (Civ. Code, sec. 1113), embraces the lien of these taxes. Such covenant was, however, a personal covenant of the same character as would be a covenant against any other encumbrance, and the rule is of ancient authority that a covenant that the land conveyed is free from encumbrances, whether express or implied, does not run with the land or pass to the assignee: *Lawrence v. Montgomery*, 37 Cal. 183. The plaintiffs had no contractual relation with the defendant, and his covenant with Jackson did not pass to them. They could have pro-

tected themselves against these taxes either by assuming their payment as a part of the consideration for the purchase, or by suitable covenants with Jackson, but they have no right of action therefor against the defendant. *San Gabriel etc. Co. v. Witmer etc. Co.*, 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, cited by the respondents, involved a consideration of the relative obligations between a mortgagee and the owner of the land mortgaged, by reason of the peculiar provisions of the constitution in reference to the assessment and payment of taxes upon these respective interests in the land, and was determined upon the ground that by virtue of these provisions there is a personal obligation upon the mortgagee in favor of the mortgagor for the payment of the taxes assessed upon the mortgage, and that if these taxes are paid by the owner of the land he may reimburse himself therefor, either by deducting the amount from the mortgage debt, or in a separate action therefor. There is, however, no personal obligation upon the owner of land for the taxes levied against it, and the payment of such taxes can be enforced only by a sale of the land in the mode prescribed by the statute. The defendant was under no personal liability for the taxes paid by the plaintiffs, and the case cited is not applicable to the present case.

The judgment is reversed, and, the appellant having died since the submission of the appeal, the judgment of reversal will be entered nunc pro tunc as of August 24, 1900.

Van Dyke, J., concurred.

GAROUTTE, J., concurring. At the oral argument of this cause I was impressed with the soundness of respondents' position, ¹¹² but upon further consideration my opinion has undergone a change. Respondents say: "Suppose Heaton's deed to Jackson had been a mere quitclaim instead of a bargain and sale, would Jackson's right of recovery, if he had continued to be the owner on the date of the delinquency of the tax, and had then paid it, been lessened in the least?" I am satisfied an affirmative answer to this question must be returned. In the absence of some covenant from Heaton, Jackson, under a quitclaim deed, would take the land just as it was, regardless of the nature of the title, or the number or character of liens resting upon it. If the lien upon the land had been a judgment or mortgage lien, and Heaton had given Jackson a quitclaim deed, Jackson would have had no claim against Heaton; and the fact that the lien here was one for taxes, rather than that

of a mortgage, judgment, or attachment lien, cannot affect the principle involved. It seems to be conceded by respondents that they are in no better position than Jackson would be under a quitclaim deed from Heaton. And as we have seen, Jackson, under those circumstances, would have no recourse against Heaton for liens resting upon the land at the time Heaton gave his quitclaim deed.

I concur in the views expressed by Mr. Justice Harrison, and also in the judgment of reversal.

TAXES--PERSONAL LIABILITY FOR.—The owner of real estate is not personally liable for taxes assessed against another as the owner: Note to *Richards v. Commissioners*, 42 Am. St. Rep. 657. That taxes upon real estate constitute a personal liability against the person owning it at the time they accrued, but not against a subsequent purchaser thereof, see *Smith v. Elgerman*, 5 Ind. App. 269, 51 Am. St. Rep. 281, 31 N. E. 862.

COVENANTS NOT RUNNING WITH THE LAND: See the monographic note to *Geisler v. De Graaf*, 166 N. Y. 839, post, p. 659, 59 N. E. 993, on what covenants run with the land.

GREENEBAUM v. DAVIS.

[181 Cal. 146, 63 Pac. 165.]

ESTOPPEL.—FORECLOSURE OF MORTGAGE—SEPARATE ACTION BY JUNIOR LIENHOLDER OR HIS ASSIGNEE. A decree foreclosing a mortgage does not estop the holder of a junior lien or his assignee from maintaining a separate action to sell any unsold portion of the mortgaged land and to reach any surplus paid into court under such decree, although the junior lienholder was made a party defendant to the action of foreclosure, if he did not appear therein or set up his lien in that action.

R. H. Latimer, for the appellants.

Edward J. Pringle, for the respondent.

146 HAYNES, C. This appeal is from the judgment upon the judgment-roll.

Defendant John Davis was the owner of an undivided interest in the rancho San Pablo. In January, 1885, one Lynch obtained a judgment against Davis for two thousand one hundred and eighty-four dollars and four cents and nineteen dollars costs, and in February of the same year the undivided interest of Davis in said rancho was sold to one Waterman for the sum of two thousand three hundred dollars and forty-two cents, who received a sheriff's deed therefor. Said undivided interest

so sold was, however, subject to a mortgage for the sum of seventeen thousand nine hundred and sixty dollars and twenty-five cents held by Rudolph Hochkofler, the trustee in bankruptcy, for the creditors of D. Ghirardelli.

At the time said deed was executed to Waterman there was a suit pending in the superior court of the city and county of San Francisco, brought by Joseph Emeric against Juan B. Alvarado et al., the object of which was to partition said rancho; ¹⁴⁷ and said Davis, Hochkofler, and Waterman, who were made defendants to said action, stipulated therein that all such lands as might, upon final partition, be allotted to Davis in satisfaction of his undivided interest in the ranch, should be decreed to him as owner, that the mortgage of Hochkofler should be a lien upon the lands so set apart to Davis for the amount of his mortgage, with interest, and that Waterman should have a lien, subject to said mortgage, for two thousand three hundred dollars and forty-two cents and interest, and this stipulation was confirmed by an interlocutory decree entered in said cause, the claim of said Waterman to become due upon the entry of the final decree, which was March 3, 1894, and which confirmed the interlocutory decree.

Hochkofler, in 1888, commenced an action to foreclose his mortgage and made Waterman a defendant, but this suit was not pressed until after the final decree in the partition case, when John Lloyd, who became trustee after the death of Hochkofler, amended the complaint and prosecuted the foreclosure suit to a final decree. Waterman did not answer or assert his lien in that action, but made default. The officer making the sale under Lloyd's decree was directed to pay into court any surplus money that might remain after paying the amount due to Lloyd.

The present action was commenced by the plaintiff Greenebaum, the successor in interest of Waterman, on March 2, 1897. His prayer is in substance that any portions of the lands not sold to satisfy the prior mortgage be sold, and that any surplus proceeds paid into court under Lloyd's decree be paid to the plaintiff.

These facts are, in substance, alleged in the complaint, and the defendants demurred thereto on the following grounds: 1. That there is another action pending between the same parties for the same cause; 2. That the complaint does not state facts sufficient to constitute a cause of action; and 3. That the court has no jurisdiction of the subject of the action. The demurrer

was overruled and the defendant answered. Upon the trial plaintiff had findings and judgment.

Appellant's principal point is thus stated: "The holder of the note secured by the second mortgage cannot, after foreclosure¹⁴⁸ of the prior mortgage by a suit to which he was made a party defendant, and in which all his rights might have been settled, maintain an action upon the note against the maker."

To this point he cites *Brown v. Willis*, 67 Cal. 235, 7 Pac. 682, and *Hefner v. Northwestern Mut. Life Ins. Co.*, 123 U. S. 747, 8 Sup. Ct. Rep. 337, and other cases.

In the first of these cases one Aldrich brought suit to foreclose a mortgage executed by one Willis to secure a promissory note. Brown was made a party to that action because he held, as assignee, a subsequent mortgage upon the same premises to secure a promissory note which was due at the time the suit was commenced by Aldrich. Brown answered, and, as said in the opinion, "set up his note and mortgage, and as the note was due, if his pleadings were appropriate, as they should have been, the court could and should have ascertained" the amount due to each of the parties, and ordered a sale and the application of the proceeds to Aldrich and Brown in the order of priority.

The case at bar is materially different. Here the plaintiff, though made a party defendant to the foreclosure suit brought by Hochkofler to foreclose a prior lien, did not answer or set up his claim by cross-complaint or otherwise, and therefore the plaintiff in this action is precisely within the rule laid down in the case of *Savings Bank v. Central Market Co.*, 122 Cal. 28, 34, 54 Pac. 273, where Mr. Justice Temple cited *Brown v. Willis*, 67 Cal. 235, 7 Pac. 682, and commenting thereon said: "I am unable to comprehend the rationale of the decision, unless it was upon the theory that the second mortgagee had made himself an actor in the case—had put his rights as mortgagee in issue, and had then, through his neglect, allowed judgment to go against him adjudging that he had no lien or claim upon the premises. The only issue tendered to the junior mortgagee, by merely making him a party to a suit to foreclose brought by the prior mortgagee, is in the allegation that the right or claim of the junior mortgagee is subject to the lien claimed by the plaintiff in the foreclosure suit. As to any possible defense he may have to that issue so tendered, he is concluded by the decree whether he appears in the case or not. The doctrine appealed to does not and cannot go beyond that."

¹⁴⁹ The question made by appellants having been thus expressly considered and decided by this court, it is not necessary to examine cases decided in other jurisdictions.

The question whether Waterman or the plaintiff is or was a redemptioner does not arise upon this record; and this remark also applies to appellants' contention that the decree in the Hochkofler foreclosure case, ordering that any surplus remaining after satisfaction of the sums due the plaintiff in that action be paid into court, is void. No issue was made as to said surplus, nor does it even appear that there was in fact a surplus, or that a sale had been made under the decree foreclosing the Hochkofler mortgage. No other questions require notice.

I advise that the judgment be affirmed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Henshaw, J., McFarland, J., Temple, J.

THAT A JUNIOR MORTGAGEE MAY REDEEM from a sale made under a senior mortgage, see notes to Long v. Richards, 64 Am. St. Rep. 289; Cram v. Cotrell, 58 Am. St. Rep. 718.

CITIZENS' BANK OF LOS ANGELES v. LOS ANGELES IRON AND STEEL COMPANY.

[131 Cal. 187, 63 Pac. 462.]

TRUST DEED SECURING MANY BONDS—COUPON HOLDER'S RIGHT OF ACTION.—If a deed of trust has been given to secure many bonds and coupons, and the holder of matured, unpaid coupons requests the trustee to bring suit thereon, which he refuses to do, the holder may sue the company thereon, without a prior demand, although the trustee may be justified, under the terms of the deed, in his refusal.

TRUST DEED SECURING MANY BONDS—SUIT BY COUPON HOLDER—COMPLAINT.—When a deed of trust has been given to secure many bonds, and the holder of matured, unpaid coupons requests the trustee to bring suit thereon, which he refuses to do, and the holder brings suit to foreclose the deed of trust, his complaint, alleging that he owns certain bonds and coupons so secured, but that he is ignorant of the number of bonds outstanding and of the owners thereof, is not so uncertain as to justify a reversal of judgment for the plaintiff on the ground that he failed to allege, in his complaint, that he made known to the trustee the number of bonds held by him when demanding that the trustee should bring suit.

TRUST DEED SECURING MANY BONDS—JUDGMENT OF FORECLOSURE.—When a deed of trust has been given to secure many bonds, and a single bondholder brings suit to foreclose the deed of trust for interest on matured unpaid coupons, but with a complaint so framed as to authorize a sale of the entire mortgaged property, the substantial rights of the defendant are not injuriously affected by a judgment for the plaintiff, where it appears that all parties interested in the suit, including the trustee, were before the court, and that the bondholders, not parties, came in and surrendered their bonds and coupons.

W. B. Mathews and Charles H. McFarland, for the appellants.

F. W. Burnett and Works & Lee, for the respondent.

¹⁸⁹ **CHIPMAN, C.** Foreclosure of deed of trust. Plaintiff had judgment, from which the defendant, the Los Angeles Iron and Steel Company, appeals. The only question presented relates to the correctness of the order overruling the demurrer of defendant and appellant, the steel company.

On May 1, 1894, the steel company executed a trust deed to the National Trust Company, as trustee, to secure the payment of the principal and interest of certain bonds amounting to thirty thousand dollars, payable in ten years, and interest coupons payable semi-annually. On September 25, 1897, plaintiff brought this action, alleging that it was the owner of five thousand dollars of these bonds and of the attached coupons maturing May 1, 1895, and thereafter; foreclosure was asked for the unpaid interest only, but the complaint was framed so as to authorize the sale of the entire mortgaged property under section 728 of the Code of Civil Procedure. It was alleged that plaintiff was ignorant of the number of the bonds outstanding and the owners thereof; that the trustee had been requested to bring the suit, but had refused to do so, and that payment of the coupons had been demanded more than six months prior to the commencement of the action. An accounting was asked as to the number and ownership of the outstanding bonds and coupons.

1. The only alleged ground of ambiguity or uncertainty is that the complaint fails to show what proportion of the bonds alleged therein to have been issued by the steel company is owned and held by plaintiff, or was so held at the time it demanded of the National Trust Company, trustee under the deed of trust, to bring the suit to foreclose. This demand was made August 15, 1897, and the complaint was filed September 25, 1897, and the allegation is that plaintiff "is the owner"—i. e., was the owner—at the filing of the complaint.

Whether plaintiff in fact owned any bonds at the time it made the demand of the trustee to bring the suit, and, if so, how many, might be important as matter of defense should its ¹⁸⁰ ownership at that time be denied. But we do not think the failure to allege that plaintiff made known to the trustee the number of bonds held by plaintiff when the demand was made would be such uncertainty as would justify a reversal of the judgment. The complaint did allege the fact of ownership of certain described bonds; the trustee was made a party defendant and answered, and in its answer it stated that it refused to bring the suit for the sole reason that a majority of the bondholders had not in writing requested it to bring the suit. Defendant and appellant, the steel company, answered the complaint denying plaintiff's ownership of any bonds, and this issue was determined at the trial, and the fact was found to be that plaintiff was the owner of certain bonds and coupons as alleged in the complaint. A judgment on the merits will not be reversed on a demurrer for uncertainty and ambiguity under the circumstances as disclosed here.

2. Objection is made, presumably in support of the general demurrer, that there is no allegation in the complaint that demand for interest was made before demand on the trustee to bring the suit; no allegation that the interest had been due six months prior to demand upon the trustee; no allegation that the trustee had been informed, when he refused to bring the suit, that interest had not been paid, or that plaintiff owned the bonds, or that a majority of the bondholders had requested the trustee to bring the suit, or that an indemnity bond had been offered the trustee. These objections relate to provisions found in the bond or in the deed of trust. There was no demurrer for uncertainty in respect to these matters. The point of the general demurrer seems to be that the showing is insufficient to justify the plaintiff in bringing the action, thus taking the control of the matter out of the hands of the trustee. It appears, however, that the trustee answered, alleging that the ownership of the bonds was unknown to it and admitting that it had been called upon to bring the suit and that it refused, as already stated, for the sole reason that a majority of the bondholders had not made a written request for it to bring the action. It appears from the decree that all outstanding bonds and coupons were brought forward by their ¹⁸¹ respective owners at the trial, and all the bondholders concurred in the action and were provided for in the decree, and

none of them appeals, nor does the trustee, and that default in the payment of interest had continued for over two years prior to request on the trustee to bring the suit. No demand was made by the trustee for indemnity, and an offer of indemnity to him was, therefore, not necessary. Plaintiff could not allege the several ownerships of the bonds, for, as shown by the complaint, plaintiff did not know who were the owners, but plaintiff in effect brought the action for the benefit of all bondholders, and, as we have seen, they were all ascertained at the trial and they surrendered their bonds and coupons. As to alleging demand upon the steel company for payment, demand was alleged and that such demand was made more than six months prior to commencing the action. But no demand on the steel company was necessary, so far as it was concerned (Civ. Code, sec. 3130), the suit being all the demand required: *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745; *Jones v. Nicholl*, 82 Cal. 32, 22 Pac. 878. Furthermore, as demand was in fact alleged, a failure to state of whom made, or that the demand was made improperly or of the wrong person, would be matter of defense.

Appellant's principal contention is that a single bondholder cannot bring the suit without having shown that the trustee has arbitrarily and unlawfully refused to act: Citing *General Elec. Co. v. Le Grande Edison Elec. Co.*, 79 Fed. 25, 87 Fed. 590, and other cases.

It is well settled, I think, that any holder of unpaid coupons may sue upon refusal of the trustee to do so after request upon him: *Chicago etc. Ry. Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10, and cases last above cited. The cases cited by appellant do not require that the refusal of the trustee must appear to have been arbitrary or unlawful. Where the deed authorizes the trustee to proceed upon the written request of a majority of the bondholders, it is held in those cases that he cannot act without such petition. But the bondholder has a right of action upon showing that the trustee has refused to bring the suit, even though the trustee may have been justified under the provisions of the deed in refusing. If this were not so, it would result in placing ¹⁹² the same limitation on the right of the individual bondholder to bring the action as is placed on the trustee—namely, the written request of a majority of the bondholders—and this would practically make it possible for a majority to deprive the minority of the remedy of fore-

closure altogether. There is no provision in the deed of trust authorizing any such limitation upon the bondholder's rights.

Apart from the foregoing, as we have seen, it appeared that all the parties interested in the action, including the trustee, were before the court, and the bondholders not parties came in and surrendered to the court their bonds and coupons. Besides, it was made to appear by the answer of R. H. Herron, who was permitted to answer as a defendant, that he became the owner of all of the steel company's property at a receiver's sale, and the decree refers to him as the successor in interest of appellant. This answer was treated as a cross-complaint and was served on defendant, the steel company, and was not answered by it. The substantial rights of appellant have in no wise been injuriously affected, and no good purpose can be subserved by a retrial of the case.

The judgment should be affirmed.

Haynes, C., and Gray, C., concurred.

For reasons given in the foregoing opinion the judgment is affirmed. Henshaw, J., McFarland, J., Temple, J.

A TRUST DEED MAY BE FORECLOSED, and it is not necessary, to sustain a suit in foreclosure, that a demand should have been made on the trustee, and that he should have refused to execute the trust, and that its execution should have been impeded by any person or cause: *Clark v. Jones*, 93 Tenn. 639, 42 Am. St. Rep. 931, 27 S. W. 1009.

TRUST MORTGAGE—BONDS SECURED BY—FORECLOSURE. A trustee, as mortgagee, representing the interests of all the bondholders as beneficiaries, is the proper party to institute foreclosure proceedings, but, if he unreasonably neglects or refuses to discharge his duty in the premises, any bondholder may bring an action to enforce the security for the common benefit: *Notes to Ettlinger v. Persian Rug etc. Co.*, 40 Am. St. Rep. 589; *Farmers' etc. Trust Co. v. New York etc. Ry. Co.*, 55 Am. St. Rep. 704.

TRUST DEED—CONTRACT AS TO FORECLOSURE—VALIDITY OF.—A provision in a trust deed executed by a railway company to secure an issue of bonds, by which it is stipulated that individual bondholders are to be debarred from foreclosure proceedings until the trustee has been requested by a reasonable proportion of the bondholders to institute such proceedings, and has refused to comply with that request, is valid and obligatory. Such a stipulation does not divest the bondholders of their right to judicial remedies, but merely imposes certain conditions upon them in respect to the exercise of that right: *Selbert v. Minneapolis etc. Ry. Co.*, 52 Minn. 148, 38 Am. St. Rep. 530, 53 N. W. 1134. As to when the holder of bonds or coupons secured by a mortgage or deed of trust is entitled to bring an action to enforce their payment without resorting to the remedies specified in the deed, see *Gulford v. Minneapolis etc. Ry. Co.*, 48 Minn. 560, 31 Am. St. Rep. 694, 51 N. W. 658.

NOLAN BROS. SHOE COMPANY v. NOLAN.

[181 Cal. 271, 63 Pac. 480.]

TRADE NAME CANNOT BE USED IN ANOTHER BUSINESS.—The mere use of a trade name in one business does not give a party a right to its use in any other business.

TRADE NAME—USE OF, IN DIFFERENT BUSINESS—INJUNCTION.—The use of the trade name "Nolan Bros." by one of the brothers, engaged for ten years in the wholesale shoe business, and by another brother engaged in the retail shoe business for over twenty years, does not give a successor to the former business, who has closed it out and established a retail shoe business, the right to use the same trade name in the latter business, and he may be enjoined by the retail dealers from such use, though they did not object to his use of the name in the wholesale business. The two businesses are separate and distinct.

TRADE NAME—ABANDONMENT OF—WHAT IS NOT.—The temporary disuse of a trade name, or even the temporary use of an additional trade name in connection with it, does not show an abandonment thereof.

TRADE NAME MAY BE EMBODIED IN CORPORATE NAME.—Those entitled to use a trade name in a business may incorporate and embody the trade name in the name of the corporation, which may enjoin any infringement of the trade name.

TRADE NAME—FAMILY NAME—"NOLAN BROS."—An objection to the use of the name "Nolan Bros." is not an objection to the use of the family name "Nolan." The name "Nolan Bros." may be used as a trade name and be protected as such.

The defendant, W. H. Nolan, appealed from an order granting an injunction.

W. S. Goodfellow and James L. Robison, for the appellant.

James F. Smith, Smith & Murasky, C. W. Lynch, and F. G. Drury, for the respondent.

274 GAROUTTE, J. Two brothers by the name of Nolan were engaged for ten years in carrying on a wholesale shoe business in the city of San Francisco under the name of "Nolan Bros." One brother sold his interest in the business to the other, and that brother (W. H. Nolan) shortly thereafter closed out the wholesale business and opened up a retail shoe business at another point in the city under the name of "W. H. Nolan & Co., Successor to Nolan Bros." A third brother, P. F. Nolan, had been engaged in the retail shoe business in the city of San Francisco for twenty-two years, some of this time in company with J. C. Nolan, a brother, and some of the time joined with one or more of his sons. In the year 1895, and shortly after the defendant W. H. Nolan had

launched his retail shoe business upon the world, P. F. Nolan changed his business into a corporation under the name of "Nolan Bros. Shoe Company," ²⁷⁵ and thereupon that company brought this action to restrain defendant in the conduct of his business from using the trade name "Nolan Bros." The action is based upon the claim that such use is an infringement upon the rights of plaintiff to the use of the name "Nolan Bros."

It is asserted upon the part of defendant that plaintiff allowed him to use the name "Nolan Bros." in the conduct of his shoe business for a period of ten years without objection, and that it is now too late to attack his right to its use. Whatever legal effect this long term of use might have as against plaintiff's claims if defendant had been engaged in the retail shoe business we will not decide, for during that period of time defendant was only engaged in the wholesale shoe business, and for that reason no occasion or necessity arose for plaintiff to make any objection. The use of the name by the defendant did not interfere with plaintiff's business, and hence it was an immaterial matter to him. Plaintiff was not injured by the use of the name, and therefore was not concerned in the use. If defendant had been using the name "Nolan Bros." for these ten years in the conduct of the plumbing business, plaintiff surely could not have objected. It does not appear from the showing here made that defendant's wholesale shoe business interfered with plaintiff's retail shoe business to any degree; and without a showing of injury plaintiff had no right, under these circumstances, to object to defendant's use of the name any more than if the defendant had been engaged in the plumbing business. The mere use of a trade name in one business does not give a party a right to its use in any other business. We therefore attach no importance to the use of the name "Nolan Bros." by defendant for ten years without objection upon the part of plaintiff; and we hold that the case stands exactly as though defendant engaged in the retail shoe business, never having been in the wholesale business.

Upon the foregoing assumption, has plaintiff such an interest in the name "Nolan Bros." as to be entitled to an order restraining defendant from making use of it; and this depends upon whether or not plaintiff's predecessor in interest had established a right to the use of the trade name "Nolan Bros." in the retail shoe business when defendant started his retail ²⁷⁶ shoe business? We will not give the evidence in great de-

tail upon this question. While to some extent it may be said to be conflicting, yet we deem it ample to support the restraining order made by the trial court, to the effect that the defendant's use of the name was an interference with plaintiff's rights. Plaintiff's predecessor in interest had been carrying on the retail shoe business in the city of San Francisco twenty-two years or more; and in a great many ways, and certainly for a great portion of that time, was doing business under the name of "Nolan Bros." The evidence before us of abandonment of the name by plaintiff's predecessor in interest does not establish the fact. The fact that the name "Nolan & Sons" was used as a trademark for a certain period of time by plaintiff's predecessor in interest is but a circumstance, and not at all sufficient, of itself, to prove an abandonment. "A person may temporarily lay aside his mark and resume it without having in the meantime lost his property in the right of its use. Abandonment in the nature of a forfeiture must be strictly proven": *Browne on Trademarks*, sec. 681. In *Julian v. Julian Hoosier Drill Co.*, *Am. Trademark Cas.* 572, 573, it is said: "Abandonment means general abandonment to the public, and must be shown affirmatively and positively as affecting the interests of the public." At no time during the period of twenty-two years was the name "Nolan Bros." absent from the place of business. For fourteen years continuously prior to the commencement of this action four metallic signs in conspicuous places upon the front of the store bore the trade name "Nolan Bros." For thirteen years immediately prior to the commencement of the action, within the doorway of the store, a large glass sign carried over its front the words "Nolan Bros." For the same length of time a large sign bearing the words "Nolan Bros.," so that all could see it, was visible from the office door; and for the past two years prior to the commencement of this action it is conclusively established by affidavits that the business was in all substantial respects carried on under the name of "Nolan Bros." The fact that other trade names may have been used by plaintiff for a short period of time in connection with the one here involved cannot neutralize the effect of the evidence quoted. ²⁷⁷ Our conclusion is that this evidence greatly lacks in showing an abandonment of the right of plaintiff to use the name "Nolan Bros."

Coleman etc. Co. v. Dannenberg Co., 103 Ga. 784, 68 Am. St. Rep. 143, 30 S. E. 639, is cited to support the contention

that P. F. Nolan could not, by using the name "Nolan Bros. Shoe Co." two years before incorporation, acquire any right to the use of the name "Nolan Bros." It is claimed upon this point that the use of tags by P. F. Nolan, conspicuously indicating and representing that the business conducted by him was owned and conducted by a corporation, was a fraud on the public by which he could not acquire any right. On examination we find the case cited fails to support the contention, while *Block v. Standard etc. Co.*, 95 Fed. 978, is the other way.

It is next claimed "that defendant had the absolute right to use a sign indicating that he was the successor to Nolan Bros., 10-12 Sutter street, that being the fact." What we have already said is opposed to this contention. The wholesale business carried on by defendant and his brother in another portion of the city is not the same business now carried on by defendant. The latter is a separate, distinct, and different business, and the statement upon the sign that he (defendant) is a successor of the business formerly conducted under the name of "Nolan Bros., 10-12 Sutter street," is not correct. No one succeeded to that business and it had no successor. The business became extinct, and the sign does not express the facts.

It is insisted that "the family name of a tradesman or manufacturer cannot be made a trademark so as to exclude the right to its use by another bearing the same family name." This contention is sound to a limited extent only. If the name is used in a manner clearly indicating an intent to mislead and deceive the public, then the use of the name will be restrained by a court of equity. The first answer to appellant's contention in this regard is found in the fact that it is not a use of the family name "Nolan," standing alone, to which objection is made, but it is a use of the name "Nolan Bros."; and in a case like that at bar the principle of law invoked seems to have no application. Furthermore, it is shown by the affidavits: 278 "That the said defendant established a retail boot and shoe business at Nos. 1022 and 1024 Market street . . . and over such store placed a large sign containing the words and figures following, to wit: 'W. H. Nolan & Co., Successor to Nolan Bros., 10-12 Sutter street.' That the words 'W. H. Nolan & Co., successor to' and the words and figures '10-12 Sutter street,' are in such small and inconspicuous letters and figures that the same cannot be read at a distance of more than seventy-five feet or one hundred feet, while the words 'Nolan Bros.' are in such large and conspicuous letters and so promi-

nently displayed that the same may be readily seen and read for a distance of nearly three hundred feet thereof." It is also stated in the affidavits of various parties that said sign is a deceptive sign, and is calculated to deceive the public, and lead the public, the dealers and buyers of boots and shoes and footwear, and the patrons and customers of plaintiff to believe that the plaintiff is conducting a retail boot and shoe store, and a branch place of business at Nos. 1022 and 1024 Market street. It is further shown that almost daily, ever since the establishment of said store by said defendant at Nos. 1022 and 1024 Market street, the salesmen of plaintiff have encountered many of the buyers of boots and shoes and the customers and patrons of plaintiff, who have purchased shoes at the store of defendant under the impression and belief that they were dealing with the plaintiff. Under the foregoing facts appellant's contention upon the proposition that he has here advanced is undermined: *England v. New York Pub. Co.*, 8 Daly, 375.

The remaining propositions advanced by appellant are not considered meritorious.

For the foregoing reasons the order is affirmed.

Van Dyke, J., and Harrison, J., concurred.

PROPERTY IN A TRADE NAME WILL BE PROTECTED:
Note to Cady v. Schultz, 61 Am. St. Rep. 767; *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769, 89 N. E. 490.

STUMPF v. BOARD OF SUPERVISORS OF SAN LUIS OBISPO COUNTY.

[131 Cal. 364, 63 Pac. 663.]

WRIT OF REVIEW.—AN ANSWER TO A PETITION for a writ of review, denying its allegations, is irregular practice. The return to the writ constitutes the answer as well as the evidence, and the case is heard thereon.

WRIT OF REVIEW—INADMISSIBILITY OF HEARSAY EVIDENCE.—UNSWORN STATEMENTS made before a board of supervisors as to the qualifications of signers to a petition to create a sanitary district are incompetent. Their repetition before a court in a proceeding to review the action of the board concerning the matter is mere hearsay.

WRIT OF REVIEW—PROOF OF JURISDICTIONAL FACTS.—The jurisdiction of a board of supervisors to create a sanitary district, upon petition, depends upon the fact of the petitioners being residents and freeholders within the proposed dis-

trict, and of their signatures being genuine; and, where the statute does not prescribe the character of the proof by which these matters should be determined, they must be established in accordance with the rules of evidence.

WRIT OF REVIEW.—THE SUFFICIENCY OF THE EVIDENCE may be reviewed by an appellate court when the question involved is, whether jurisdictional facts were or were not proved in the inferior court or tribunal.

WRIT OF REVIEW—ESTABLISHMENT OF JURISDICTIONAL FACTS—REVIEW OF EVIDENCE.—In a proceeding, by petition, before a board of supervisors to create a sanitary district, the decision of the board as to the sufficiency of the evidence to establish jurisdictional facts is reviewable upon a writ of review, but it is only such evidence as was heard by the board upon questions essential to their jurisdiction that can be considered in determining whether the board acquired jurisdiction.

COUNTIES.—THE CREATION OF A SANITARY DISTRICT BY A BOARD OF SUPERVISORS IS VOID unless the notice required by law was posted. Hence, where there is no evidence of such posting, and no recital thereof in the record, a subsequent declaration of the board that the district was duly organized is a nullity.

The plaintiff appealed from a judgment of the superior court and from an order denying a new trial.

P. O. Chilstrom and S. M. Swinnerton, for the appellant.

A. E. Campbell and Venable & Goodchild, for the respondent.

HAYNES, C. This is a proceeding to review the action of the board of supervisors of San Luis Obispo county in the matter of the alleged creation of Templeton sanitary district in said county.

The plaintiff based his application for the writ upon an affidavit as required by section 1069 of the Code of Civil Procedure. The writ was issued and served and a return thereto was made, setting out the petition for the formation of the district, which purported to be signed by twenty-seven "residents and freeholders" of the district therein described.

On November 7, 1898, the board made an order reciting that "a petition in due form having been received from residents and freeholders of the district hereinafter described," praying for the creation of a sanitary district, and ordering that an election be held on December 10th by the qualified electors residing within the district, the boundaries of which were stated in the order, designating the place at which the election should be held and the persons who should conduct the same, and further ordering "that a copy of said order be posted for

four successive weeks prior to said election in three public places within the proposed district," and that it should be published for four successive weeks in the "Templeton Advance."

The return to the writ further shows that officers of the district were nominated, and an affidavit of the publication of said order calling an election was made and filed; that on January 4, 1899, the board canvassed the returns of the election and found the whole number of votes cast to be, for a sanitary district, fifty-nine votes, and against it forty-four votes, and that persons therein named had been elected respectively to the ~~sae~~ offices of sanitary assessor and members of the sanitary board, and declared that "a sanitary district, to be known and designated Templeton sanitary district, has been duly established," with boundaries therein described.

The return does not show that any evidence was taken or heard as to whether the signatures to the petition were genuine, nor whether twenty-five of them were each a resident freeholder within the boundaries of the proposed district, nor does the return show that the order calling an election was posted in three public places within said proposed district for four weeks, or at all, or that any evidence in regard thereto was heard.

The defendant also filed an answer to the petition for the writ denying the allegations of the petition. This was irregular. The return to the writ constitutes the answer, as well as evidence, and the case is heard thereon, unless upon motion an additional or amended return is made.

Upon the hearing, however, Mr. Whicher, the clerk of the board of supervisors, was called by the plaintiff, and testified that no evidence was received by the board as to whether or not the signers of the petition were residents and freeholders within the district; that no witnesses were produced or examined before the board upon that question; that Mr. Smith a member of the board, examined the names and was satisfied with them.

Mr. Fisher was called by the defendant, and testified that he was one of the petitioners; that he was present at the time the petition was presented to the board. He was then asked several questions by counsel for defendant as to whether he was questioned by any member of the board as to the residence of the signers of the petition, and whether the petitioners were freeholders, and whether Supervisor Smith did not go over the names and question him in "regard to them."

These questions were each objected to by plaintiff upon the ground that it did not appear that the witness was sworn before the board, and that the questions were incompetent. Each objection was overruled, and the plaintiff excepted. The witness answered each question affirmatively, and further testified that Supervisor Smith looked over the petition and asked witness about the names, if they were freeholders, "And I said ~~367~~ yes; if you are not satisfied you can go down and look at the records"; and he said, "We will take it for granted."

No objection was made upon either side to the introduction of parol evidence, and the question of its admissibility need not now be considered; but if its admissibility be conceded, the court erred in overruling plaintiff's objections above noted, for the reason that the unsworn statements of the witness made before the board of supervisors was incompetent, and its repetition before the court was mere hearsay, or the repetition of unsworn statements, and did not tend to prove that as a matter of fact the petitioners were each residents and freeholders within the proposed district and that their signatures were genuine. The determination of these questions, upon which the jurisdiction of the board depended, required the exercise of judicial power, and as the statute did not prescribe the character of the proof by which they should be determined, they must be established in accordance with the rules of evidence recognized by the courts and the common law. "An exception to the rule that the sufficiency of the evidence will not be reviewed is made when the question is whether jurisdictional facts were or were not proved. This exception arises out of the most important office and function of the writ—the keeping of inferior courts and tribunals within proper bounds. If the decision of the inferior tribunal as to the sufficiency of the evidence to establish jurisdictional facts were not reviewable, the writ of certiorari would be of no avail as a remedy against an assumption of jurisdiction. And for the purpose of enabling the reviewing court to determine whether jurisdictional facts were established, it will require a return to be made of the evidence upon which such facts are based": 4 Ency. of Pl. & Pr. 262. This court has said: "In all cases it is essential that there be proof of a sufficient petition, inasmuch as without it the board could acquire no jurisdiction to act, and its proceedings would be absolutely void. . . . Upon certiorari, though the inferior tribunal is required to certify only matters of record, yet if the jurisdictional facts do not appear of record, it

must certify not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever question as to the jurisdiction of ~~368~~ the tribunal may be involved": In re Madera Irr. Dist., 92 Cal. 296, 333, 335, 27 Am. St. Rep. 106, 28 Pac. 272, 675; citing Blair v. Hamilton, 32 Cal. 52; Whitney v. Board of Delegates, 14 Cal. 479; Lowe v. Alexander, 15 Cal. 300.

The statute authorizing the formation of sanitary districts requires that the order or proclamation calling an election "shall be posted for four successive weeks prior to the election, in three public places within the proposed district, and shall be published," etc. The return shows that proof of publication was made by affidavit of the publisher in due form, but there is no evidence of posting, nor is there even a recital in the proceedings to the effect that such notice was posted. Without such posting the election was void, and the subsequent declaration of the board of supervisors to the effect that the Templeton sanitary district was duly organized is a nullity.

As it is only the evidence that was heard by the board of supervisors upon questions essential to their jurisdiction that can be considered by the court in determining whether the board acquired jurisdiction, it is obvious from the parol testimony hereinbefore recited that it would have been useless for the court to require an additional or amended return, and no leave to make an amended return having been requested, we advise that the judgment and order appealed from be reversed, and that judgment be entered annulling all the orders, records, and proceedings of the board of supervisors in the matter of the alleged creation of Templeton sanitary district, in said county of San Luis Obispo.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion it is ordered that the judgment and order appealed from be reversed, and that judgment be entered annulling all the orders, records, and proceedings of the board of supervisors in the matter of Templeton sanitary district, and adjudging that said district has no legal existence.

McFarland, J., Henshaw, J., Temple, J.

CERTIORARI OR WRIT OF REVIEW—JURISDICTION—RECORD.—In some of the states, the question of the jurisdiction of the court is the limit of inquiry upon certiorari: Ahlers v. Thomas, 24 Nev. 407, 77 Am. St. Rep. 820, 56 Pac. 93. Writs of certiorari

issue only to review judicial proceedings, and to restrain inferior judicial tribunals from exceeding their jurisdiction: See the extended note to *Mayor v. Morgan*, 18 Am. Dec. 236. The question of jurisdiction must be determined from the record taken as a whole: *Wulff v. Superior Court*, 110 Cal. 215, 52 Am. St. Rep. 78, 42 Pac. 638. In the absence of statutory authority, the record cannot be contradicted by extrinsic evidence, and the petitioner's cause must be determined on the record alone: Note to *Los Angeles v. Young*, 62 Am. St. Rep. 238.

CERTIORARI—REVIEW OF EVIDENCE.—In those states in which the evidence may be brought before the superior court upon certiorari, it is a fair summary of the decisions upon the topic to say that that court may examine it, not for the purpose of determining the credibility of witnesses or the weight to be given conflicting testimony, but solely for the purpose of determining whether, from competent evidence before it, the decision of the inferior court is sustainable, and, if so, such decision cannot be set aside as against or not supported by the evidence, and, on the other hand, if there was no competent evidence to sustain such decision, it must be annulled: See the monographic note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 35, discussing questions reviewable upon certiorari.

FREEMAN v. BARNUM.

[131 Cal. 386, 63 Pac. 601.]

RES JUDICATA.—A FORMER JUDGMENT BETWEEN THE SAME PARTIES IS AN ESTOPPEL in another suit between them upon a different cause of action as to points or questions actually litigated and determined, but not as to questions involved and defenses which might have been, but were not, raised.

ESTOPPEL.—A FORMER JUDGMENT BETWEEN THE SAME PARTIES IS NOT AN ESTOPPEL in a different action between them upon a different cause of action, as to a question which is not shown by the record to have been raised and litigated, though the matter was necessarily involved, and must have been determined before judgment could have been entered in the former suit. This rule applies to a question concerning the constitutionality of a law necessarily involved in the former action.

ESTOPPEL—FORMER ADJUDICATION OF DEFENSE IN ACTION FOR SALARY—MANDAMUS.—In a proceeding by mandamus to compel an auditor to draw a warrant in favor of the petitioner for certain installments of salary alleged to be due him as assistant district attorney of the county, a former judgment upon mandamus compelling the auditor to draw such a warrant in favor of the same officer and adjudging, as insufficient, a defense that the office had been terminated by a rescission of the order authorizing the appointment, is an estoppel as to such defense in the latter action.

L. L. Cory, for the appellant.

N. C. Coldwell, for the respondent.

333 TEMPLE, J. This is an application for a writ of mandate to compel the defendant, who is auditor of Fresno county, to draw a warrant in favor of the petitioner for certain installments of salary alleged to be due him as assistant district attorney of said county.

In the County Government Act of 1893 (Stats. 1893, p. 346), in section 25, it is provided as follows: "The boards of supervisors, in their respective counties, have jurisdiction and power, under such limitations and restrictions as are prescribed by law: Subd. 36. To authorize the district attorney to appoint an assistant district attorney, which office is hereby created," etc.

Pursuant to this act the supervisors of Fresno county, on the nineteenth day of November, 1895, duly authorized the district attorney to appoint such officer, and accordingly the appellant was appointed December 2, 1895, and immediately qualified, and has ever since continued to discharge the duties of the office. On the 16th of February, 1897, the board of supervisors of the county of Fresno made an order revoking and rescinding the order authorizing the district attorney to appoint an assistant. This action was brought to compel the payment of salary for the months of February, March, and April, 1898.

In defense, the auditor contends that the statute giving the supervisors power to authorize the district attorney to make **339** the appointment is void; and also that the rescinding of the order by the supervisors terminated the office.

The last point above mentioned seems to possess merit, but, unfortunately, the auditor is in no condition to urge that defense. The plaintiff, in his petition, sets up as an estoppel a former judgment between the same parties in a proceeding to compel defendant to issue a warrant for salary which accrued in March, 1897. As a defense in that case, the auditor, who is also defendant in this, set up the order made February 15, 1897, rescinding and revoking the said order made November 19, 1895, in pursuance of which the plaintiff was appointed. It is averred that the issue so raised was duly tried and determined by the court, and judgment rendered, in effect, holding that said attempt to rescind the order of November 19, 1895, was ineffectual, and did not deprive plaintiff of his right to be paid for his services. These allegations as to the former adjudication are not controverted in the answer.

The matter, then, was directly put in issue in the former action, and it was there duly tried and solemnly adjudged that,

notwithstanding the rescinding order, plaintiff was entitled to his salary.

The law upon this subject is stated by Justice Field in *Cromwell v. Sac County*, 94 U. S. 351. It was held that a judgment between the same parties is an estoppel in another suit upon a different cause of action as to points or questions actually litigated and determined. If the point or matter of fact has by them or those to whom they are privy in estate been once distinctly put in issue and solemnly found against them, they are precluded from contending to the contrary.

But this estoppel in actions upon a different cause of action only extends to matters actually litigated and determined, and not to questions involved and defenses which might have been, but were not, made. This applies to the question as to the constitutionality of subdivision 36 of section 25 of the County Government Act of 1893. It is true that matter was necessarily involved and must have been determined before judgment could have been entered in the former suit. But it does not appear from the record that such question was raised and litigated. This being a different action upon a different cause of ³⁹⁰ action, the defendant is not estopped from raising the objection. But that matter is easily determined. The assistant district attorney was but a deputy, and by section 61 of the same act the district attorney could appoint as many deputies as he saw fit. The statute only authorized the board to pay an additional assistant. That they may do this follows from the views expressed in *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427.

If the plaintiff was not a deputy, but was filling an office created by the subdivision alluded to, the result would be the same. The board then had the power to authorize the district attorney to fill the office when, in their judgment, the public interest required it. In my judgment, the board could also cause the appointee to be discharged, when in their judgment, his services were no longer required (*Ford v. Harbor Commrs.*, 81 Cal. 19, 22 Pac. 278), but defendant is precluded from making that defense.

The judgment is reversed and a new trial ordered.

McFarland, J., and Henshaw, J., concurred.

ESTOPPEL—RES JUDICATA—DIFFERENT CAUSE OF ACTION.—IF A SECOND ACTION between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the finding or judgment is rendered, and does

not extend to matters which might have been, but were not, litigated and determined in the former action: *Pitts v. Oliver*, 13 S. Dak. 561, 79 Am. St. Rep. 907, 33 N. W. 591; *Slater v. Skirving*, 51 Neb. 108, 66 Am. St. Rep. 444, 70 N. W. 493. In a subsequent action between the same parties upon a different cause of action, the judgment in the former action is conclusive as to every question actually litigated and decided therein: *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599.

ESTATE OF SMITH.

[131 Cal. 433, 63 Pac. 729.]

DESCENT—BROTHERS AND SISTERS INCLUDE THOSE OF HALF BLOOD.—The expression "brothers and sisters of the decedent," in a statute of descent, providing that, in certain cases, one-half of the estate shall go to them, includes those of the half blood.

DESCENT--EXCLUSION OF HALF BLOOD.—A statute of descent which provides that kindred of the half blood shall inherit equally with those of the whole blood in the same degree, but which excludes kindred of the half blood in favor of kindred of the whole blood when the former are not of the blood of the ancestor from whom the estate came by descent, devise or gift, applies only where such kindred are "in the same degree." It does not apply to a case in which the degrees are not the same. The half blood are excluded only when there are others in the same statutory class who are to be preferred by reason of being of the blood of the ancestor from whom the estate came to the intestate.

DISTRIBUTION—HALF-SISTERS ARE ENTITLED TO, WHEN.—If a wife dies intestate, leaving property inherited from her father, and surviving her husband, and two half-sisters on the mother's side, one-half of the estate, the other half going to the husband, must be distributed to such half-sisters, for there are no others in the same degree or statutory class who are to be preferred by reason of their being of the blood of the ancestor from whom the estate came to the intestate.

Section 1394 of the Civil Code, construed in the opinion, reads as follows: "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance."

Rodgers, Paterson & Slack, for the appellants.

J. N. Young, for the respondent.

⁴³⁴ SMITH, C. This is an appeal from a decree of distribution. The deceased, who died intestate, inherited the prop-

erty distributed from her father. She left surviving her husband, and two half-sisters on the mother's side, the appellants. The whole of the property was distributed by the decree to the respondent and the appellants excluded. The case turns upon the construction of the provisions of the Civil Code governing successions, and especially of those of sections 1386 (2) and 1394. By the former provision it is especially provided in the case here presented that the husband shall take one-half of the estate and the sisters the other half; but it is contended that by the latter section the sisters are excluded as not being of the blood of the ancestor from whom the defendant derived the estate; and it was so held by the court. But I do not think this contention can be sustained.

The section in question consists of two clauses connected by the conjunction "unless," which, as said by Lord Mansfield (*Smith v. Wilson*, 3 Burr. 1556), means the same as "except," and hence implies merely an exception to the first clause: *Standard Dictionary*; *Century Dictionary*; *Ryan v. Andrews*, 21 Mich. 234, 235; *Estate of Kirkendall*, 43 Wis. 173-175, 177 et seq.; *Rowley v. Stray*, 32 Mich. 75, 76. The last clause can, therefore, apply only to the class described in the first, or, in other words, to the class from which it constitutes an exception, which is, kindred "in the same degree." Hence, it can have no application to the relations between different classes as determined by degree of kindred or otherwise, as, e. g., between half brothers or sisters and remote collateral kin, or between grandparents and uncles or aunts, as in *Ryan v. Andrews*, 21 Mich. 234, and in *Estate of Kirkendall*, 43 Wis. 173. The effect of the provision is therefore simply to subdivide each of the classes as determined by degree of relationship into two classes, namely, those of the full and those of the half blood, and in each class ⁴³⁵ to postpone the latter to the former. Its effect, therefore, is precisely that of the Missouri statute cited in 61 Am. Dec. 664, or of the Indiana statute cited in *Robinson v. Burrell*, 40 Ind. 336.

Hence, the provision has no application as between kindred in different degrees, but the relative claims of these are determined exclusively by the provisions of section 1386 of the Civil Code, where the terms "brothers and sisters," and other terms denoting kindred of various degrees, are used in their proper sense, and, "according to the approved usage of the language" (Civ. Code, sec. 13), must be held to include those of the half as well as of the whole blood: *Rowley v. Stray*, 32 Mich. 75, 76,

and cases cited on page 75. The two sections, therefore (1386, 1394), in nowise conflict, but together prescribe a system not only complete and harmonious, but also equitable, and in accordance with the general sentiments of mankind; on which in fact—and not on the obsolete feudal reasons on which the common-law doctrine of inheritance of real estate was based—our law of succession is based.

This construction is supported by the cases cited above, in which substantially similar enactments were construed, and also by the case of *Robinson v. Burrell*, 40 Ind. 336, where the statute construed is different, but the principle of the decision is the same. In that case there was an old statute (cited *supra*) identical in effect with ours, which had been superseded by a new statute couched in less definite terms; and it was held that it would be unreasonable—the statute admitting of a different construction—to construe it as postponing the kindred of the half blood “until after there was a failure of all kindred of the intestate who have the blood of the ancestor from the estate descended, however remote in degree”—a principle equally applicable here.

There are two cases that seem to conflict with these views, viz., *Perkins v. Simonds*, 28 Wis. 90, and *Kelly v. McGuire*, 15 Ark. 555. But the former is expressly limited and in effect overruled in *Estate of Kirkendall*, 43 Mich. 175. And again in *Shuman v. Shuman*, 80 Wis. 479, 50 N. W. 670, it was held that the provision construed did not apply to personal property; which was ⁴³⁶ also in effect to overrule the decision, for neither in the laws of Michigan nor in our own is there room for such a distinction. It may be added that the attention of the court was not drawn to the grammatical construction of the section. Hence, the court assumed that “the words of the section are general,” not noticing the fact that the first clause refers only to the class specified, and that the latter could not have a more extensive application. The same remark applies to the Arkansas case.

The true rule is stated by Judge Cooley in *Rowley v. Stray*, 32 Mich. 75, as follows: “Ours is but the expression of a general policy which has always characterized our legislation, . . . and which, . . . in most respects, has put the half blood on a footing of equality with the whole blood in the law of descents. . . . A discrimination against the half blood is the exception, and is not to be extended beyond the obvious intent. And nothing seems plainer to us than that under this statute

the half blood are only excluded when there are others in the same statutory class who are to be preferred by reason of being of the blood of the ancestor from whom the estate came to the intestate. This was the view taken by us when *Ryan v. Andrews*, 21 Mich. 229, was before us, and further reflection has confirmed us in it." It follows that the appellants are entitled to their shares of the estate as prescribed in section 1386, subdivision 2.

The order appealed from should be reversed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed.

McFarland, J., Temple, J., Henshaw, J.

DESCENT—KINDRED OF THE HALF BLOOD.—In Indiana, the statute declares that kindred of the half blood shall inherit equally with those of the whole blood, but if the estate shall have come to the intestate by gift, devise, or descent from any ancestor, those only who are of the blood of such ancestor shall inherit, provided that on failure of such kindred other kindred of the half blood shall inherit as if they were of the whole blood; and this statute has been interpreted as if it read as follows: "Kindred of the half blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise, or descent from any ancestor, those kindred of the half blood only who are of the blood of the ancestor shall inherit, provided that on the failure of such kindred of the half blood being the blood of such ancestor, other kindred of the half blood shall inherit as if they were of the whole blood": See the monographic note to *In re Ingram*, 12 Am. St. Rep. 81, 111, on succession to estates of intestates.

FENNELL v. DRINKHOUSE.

[131 Cal. 447, 63 Pac. 734.]

HUSBAND AND WIFE—RECOVERY OF COMMUNITY PROPERTY FROM WIFE'S ADMINISTRATOR — PROPER FORUM.—If money is deposited in bank by a wife in her own name, and falls, after her death, into the hands of her administrator, but is claimed by her husband as community property, he can maintain an action in the superior court, outside of its probate department, to recover it.

HUSBAND AND WIFE—RECOVERY OF COMMUNITY PROPERTY FROM WIFE'S ADMINISTRATOR.—When money deposited in bank by a wife in her own name after marriage falls, after her death, into the hands of her administrator, but is claimed by her husband as community property, an action by him to re-

cover it is for money had and received to the use and benefit of the plaintiff. It is not a claim against the deceased, nor is it a suit against her estate.

HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTION—BURDEN OF PROOF.—Money deposited in bank by a wife in her own name is presumed to be community property, and the burden is upon her representative to show that it was separate property.

HUSBAND AND WIFE—COMMUNITY PROPERTY—EARNINGS OF WIFE.—Money earned by a wife while living with her husband is community property.

HUSBAND AND WIFE—COMMUNITY PROPERTY—POSSESSION OF, AS AFFECTING THE SURVIVOR'S RIGHT.—A wife's possession of community property is the possession of her husband, and the survivor's right therein does not depend upon its possession prior to the death of the other spouse.

LIMITATIONS OF ACTIONS—RECOVERY OF COMMUNITY PROPERTY FROM WIFE'S ADMINISTRATOR.—A husband's right of action to recover community property from the administrator of his deceased wife is not barred by the statute of limitations because of her custody of the property before her death.

George F. Shelton, for the appellant.

Emil Pohli, for William Fennell, respondent.

A. Ruef, for Drinkhouse, respondent.

449 HAYNES, C. Winifred Fennell, deceased, was the wife of the plaintiff William Fennell. She died in the city and county of San Francisco, November 28, 1899, leaving estate therein, and the defendant Drinkhouse was duly appointed special administrator of her estate. On February 15, 1900, as such special administrator, he took possession of the sum of four thousand two hundred and twenty-three dollars and fifty-seven cents then on deposit with the Hibernia Savings and Loan Society in the name of Winifred Chapple (by which name the deceased was sometimes known), and this action was brought by the plaintiff against said Drinkhouse to recover said money, claiming that it was acquired by the plaintiff and said Winifred after their marriage, and that it was community property to which he was entitled.

After the appointment of defendant Drinkhouse as special administrator, a will executed by said deceased in her lifetime was found and probated, and Maria Teresa Elliott was duly appointed and qualified as executrix; but said William Fennell having taken an appeal from the order probating said will, her letters were revoked and she was appointed special administratrix of said estate succeeding defendant Drinkhouse, and as

such she filed a complaint in intervention in this action, claiming that the whole of said moneys were the separate property of said Winifred in her lifetime, and belonged to her estate, and that she as special administratrix, was entitled to the possession of the whole thereof.

The plaintiff answered said complaint in intervention, the cause was tried by the court, and findings were for the plaintiff, to the effect that he was entitled to eighteen hundred and fifteen dollars and seventy-seven cents (part of said sum of four thousand two hundred and twenty-three dollars and fifty-seven cents), and costs, and that the intervenor was entitled to the remainder of the fund, less disbursements made by defendant Drinkhouse as special administrator, and judgment was entered accordingly. This appeal is by the intervenor from the judgment, and from an order denying her motion for a new trial.

Appellant formulates three propositions upon which a reversal is claimed, and states that the various assignments of ⁴⁵⁰ error range themselves under one or the other of them. These grounds will be noticed in their order:

1. "That plaintiff has mistaken his forum and his remedy."

It is contended that the department of the superior court in which the settlement of the estate of Winifred Fennell was pending alone had jurisdiction of the subject matter of this litigation under section 1723 of the Code of Civil Procedure, and that the remedy therein provided is exclusive.

Said section has no application. It appears to relate to real estate alone. There would seem to be no reason for recording in the recorder's office a certified copy of a decree determining whether the money here in controversy belonged to the plaintiff or to the estate.

Nor, under the facts of this case, is it a proper subject of litigation in the probate department of the superior court. If the money in question was, in fact, community property in the possession of Mrs. Fennell at the time of her death, it is no part of her estate. It is still in the hands of the special administrator, but that fact does not create a debt against the estate in favor of the plaintiff for which he must present his claim and take chances as to the solvency of the estate. If the community property in question were horses or cattle, there can be no doubt that plaintiff could recover possession of them in an action of claim and delivery; and it is equally clear that he could not in such cases have that remedy in the probate proceedings concerning Mrs. Fennell's estate.

2. Appellant further contends that "plaintiff cannot recover in this action, because he failed to identify the specific fund for which he sues."

Counsel, I think, shows quite conclusively that "this cannot be treated as a suit on a claim against the deceased," not only because no claim against the estate was presented, but because it is not a suit against the estate, but is an action against John A. Drinkhouse "for money had and received to and for plaintiff's use and benefit, in the said sum of four thousand two hundred and twenty-three dollars and fifty-seven cents." There is no question about the identity of the fund received and held by defendant Drinkhouse. The only questions are, ⁴⁵¹ Is it community property? Or if part only is community property, how much?

Appellant contends that the evidence is insufficient to justify the finding that any part of the money deposited in the bank by the wife was community property.

All the money found in the bank and received by the special administrator was deposited after the marriage of plaintiff and Mrs. Fennell, and the presumption therefore was, in the absence of other evidence, that all of it was community property, and the burden of proof was upon appellant. This presumption can be overcome "only by evidence of a clear, certain, and convincing character establishing the contrary; and the burden of this showing rested with the parties claiming the separate character of the property. In the absence of such proof the presumption as to the community character was absolute and conclusive": *In re Boody*, 113 Cal. 682, 686, 45 Pac. 858, and cases there cited. There was evidence tending to show that a portion of the money deposited by Mrs. Fennell in the Hibernia Savings and Loan Society was the proceeds of the sale of some real estate which was her separate property, and it also appeared that certain rents thereof entered into the account; but beyond that the evidence was confused and conflicting, and wholly insufficient to overcome the presumption that it was community property. Evidence that the husband did little work, and therefore did not earn the remainder of the money after deducting the proceeds of the real estate, was inconclusive, if not immaterial, since if the deposit consisted wholly of the earnings of the wife while living with her husband, it was nevertheless community property.

3. It is further insisted that "the right of plaintiff to claim

the money as community property is barred by the statute of limitations."

The possession of community property by the wife is the possession of the husband. The right of the survivor does not depend upon the custody or possession of the community property prior to the death of the deceased spouse.

No other questions are discussed.

⁴⁵² I advise that the judgment and order appealed from be affirmed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

DISTRIBUTION OF COMMUNITY PROPERTY AS PART OF WIFE'S ESTATE—JURISDICTION—HUSBAND'S RIGHT.—The distribution of a wife's estate cannot prejudice the husband's claim that property which the decree of distribution purports to distribute was in fact community property, and belonged to him as the survivor of the community, for the court has no jurisdiction over such property in administering the estate of the wife: *Estate of Rowland*, 74 Cal. 523, 5 Am. St. Rep. 464, 16 Pac. 315. A probate court has no jurisdiction to try title. It has power to act only when the property is, in fact, that of the decedent: *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679, 76 N. W. 233. A probate court is without jurisdiction to try the title to property as between the representative of an estate and the husband of the deceased party claiming adversely thereto: *Stewart v. Lohr*, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457; and a superior court sitting as a court of probate cannot determine disputes between heirs or devisees and strangers as to title to property: *Buckley v. Superior Court*, 102 Cal. 6, 41 Am. St. Rep. 135, 36 Pac. 360.

COMMUNITY PROPERTY — PRESUMPTION — BURDEN OF PROOF.—All property acquired by either husband or wife during the existence of the community is presumed to belong to it, and this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one spouse or the other; and the burden of proof lies upon the party claiming the property as separate: *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533; *Peck v. Brummagin*, 31 Cal. 440, 89 Am. Dec. 195; *Althof v. Conheim*, 38 Cal. 230, 99 Am. Dec. 363; *Morris v. Hastings*, 70 Tex. 26, 8 Am. St. Rep. 570, 7 S. W. 649.

COMMUNITY PROPERTY—EARNINGS OF WIFE—POSSESSION.—All property acquired after marriage by either husband or wife is community property, except when acquired by gift, bequest, devise, or descent: See the monographic note to *Cooke v. Bremond*, 86 Am. Dec. 629, showing what is community property, and when the presumption that property is community may be rebutted. The wife's earnings, as well as those of the husband, must be regarded as community property: Note to *Cooke v. Bremond*, 86 Am. Dec. 634. Her earnings belong to him while they are living together as man and wife: Notes to *Bailey v. Gardner*, 13 Am. St. Rep. 859; *Miller v. Miller*, 16 Am. St. Rep. 437; and do not, during such

time, become her separate estate: *Abbott v. Wetherby*, 6 Wash. 507, 86 Am. St. Rep. 176, 88 Pac. 1070. As to community property, the possession of the wife is that of her husband: *People v. Swalm*, 80 Cal. 46, 18 Am. St. Rep. 96, 22 Pac. 67.

HEDGE v. WILLIAMS.

[181 Cal. 455, 63 Pac. 721, 64 Pac. 106.]

MASTER AND SERVANT—NONLIABILITY FOR NEGLIGENCE OF SERVANT OF INDEPENDENT CONTRACTOR—DUAL CAPACITY.—Dealers in hardware, tinware, plumbing, etc., engaged by the manager of a fruit farm to repair a tank thereon, used for storing distillate, are independent contractors, and not servants of the owner of the farm. Hence, such owner is not answerable in damages for the death of one of his own employees occasioned by an explosion of the tank through the negligence of a servant employed by such contractors, although the manager acted in a dual capacity, being a member of the firm employed to repair the tank, and instructing their servant to repair it. The servant of the firm, in such a case, stands in the position of an independent contractor.

MASTER AND SERVANT—CONCLUSIVENESS OF VERDICT AS TO CAPACITY IN WHICH SERVANT ACTED—DUTY OF COURT.—If a firm of dealers in hardware, tinware, plumbing, etc., has been engaged to repair a tank on a fruit farm, used for storing distillate, and an employé of the owner of the farm is killed by an explosion of the tank through the negligence of a servant employed by the firm, whereupon an action for damages is brought against the owner of such farm, a verdict for the plaintiff is not conclusive that the servant employed by the firm was acting as a servant of the defendant in repairing the tank, where the evidence shows, without conflict, that he was an employé of the firm. Upon such a state of facts, it becomes the duty of the appellate court to decide, as a matter of law, what the facts prove.

NEGLIGENCE CAUSING DEATH—ACTION FOR—RES GESTAE—INADMISSIBLE DECLARATIONS.—In an action for negligently causing death, the declarations of the deceased, made to third parties after the accident, form no part of the *res gestae*, and should not be admitted against the plaintiff.

J. F. Boller and Bradley & Farnsworth, for the appellant.

Roth & McFadzean, J. E. Shuey, and Charles G. Lamberson, for the respondents.

450 GAROUTTE, J. This action was brought by the surviving wife and minor children, for damages occasioned by the death of Joseph A. Hedge, the husband and father. Defendant appeals from the judgment and order denying his motion for a new trial.

The material facts in the case are as follows: Defendant was the owner of a large fruit farm near the town of Porterville. One A. H. Schultz was the superintendent of defendant in the management of the farm. A large tank, used to store distillate, was located upon the premises. Schultz discovered that the tank was leaking, and directed that the distillate be withdrawn therefrom, which was done, with the exception of possibly an inch in depth at the bottom of the tank. Schultz was also a member of the firm of Schultz & Wilson, dealers in hardware, tinware, plumbing, etc., in the town of Porterville. ⁴⁵⁷ One Fontaine was in the employ of Schultz & Wilson, directly in charge of that portion of the business including the repairing of tanks, etc., and had made this particular tank some years in the past. Schultz instructed Fontaine to repair the leak in the tank, and took him with his implements of labor to the place where the tank was located. The deceased, Hedge, was the servant of defendant, and was engaged in fixing a casing surrounding the tank. Upon the arrival of Fontaine at the tank he climbed upon it, called for a lighted lantern and a string, opened the manhole, let down the lantern within, and immediately a disastrous explosion occurred. Hedge, Schultz, and Fontaine were all seriously injured. Hedge died; the others recovered. It will be seen from the foregoing statement that the facts are neither many nor complicated; yet the dual capacity in which Schultz was acting—his Jekyll and Hyde character, as it were—adds an additional element of interest to the case.

It is claimed by appellant that Fontaine stood in the position of an independent contractor. In other words, that Schultz & Wilson stood as independent contractors in repairing the tank and that Fontaine was their servant. It is next claimed that if Fontaine was not the servant of Schultz & Wilson, he was the servant of defendant, and Hedge, being his fellow-servant, Fontaine's negligence could not form the basis of a recovery by Hedge's relatives. Of course, this contention is sound, unless defendant was guilty of negligence in selecting Fontaine to do the work. We return to the first proposition urged. Did Fontaine stand in the position of an independent contractor? If he did, then the defendant is not liable, for independent contractors alone must bear the damage occasioned by their negligence.

After viewing this evidence from every side, we are brought to the conclusion that Fontaine, in repairing this tank, was

not the servant of defendant and that his negligence in causing the explosion was not the negligence of defendant. First let us eliminate Schultz from the case in his dual capacity, and deal with him alone as a member of the firm of Schultz & Wilson. Then we have defendant personally going to the firm ⁴⁵⁸ of Schultz & Wilson, and requesting that a man be sent out to repair the leaking tank. Defendant may go one step further and request that Fontaine be sent out to repair the tank. Assuredly, Fontaine, under these circumstances, would be the servant of Schultz & Wilson, and not the servant of defendant. For nine years Fontaine had been in the employ of Schultz & Wilson, and as their employé he went with his tools to repair the tank. The firm had the power to discharge him at any moment, even at the very moment when the soldering iron was hot in his hand and the solder ready to be applied. He was paid by the firm for his labor. Defendant could hold the firm liable if his work was negligently done. Looking at the case from this angle Fontaine was not the servant of defendant. As the servant of Schultz & Wilson he stood in the position of an independent contractor; and the facts fit the case of *Bennett v. Truebody*, 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329, where the owner of a building employed a plumber to repair the water pipes; and this plumber was held to be an independent contractor.

Again, let us eliminate Schultz from the case in his character as a dealer in hardware, etc. Then we have him as the superintendent of defendant, requesting the firm of Wilson & Co. to repair this tank; or we may go one step further and say he requested the firm to send out their man Fontaine to repair the tank. Under these circumstances Fontaine still would be the servant of Wilson & Co., and to no degree the servant of defendant. In the early English case cited in *Bennett v. Truebody*, 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329, where a butcher hired a drover to drive a bullock, the drover was held to be an independent contractor, and not the servant of the butcher. Coleridge, J., said: "The thing done is the driving. The owner makes the contract with the drover that he shall drive the beast, and leaves it under his charge, and then the drover does the act. The relation of master and servant, therefore, does not exist between them." It can hardly be claimed that the firm of Wilson & Co. were the servants of the defendant in repairing the tank; yet if they were not defendant's servants, then their employé, Fontaine, certainly was not.

⁴⁵⁹ It seems to follow from the foregoing assumptions that, in the eyes of the law, the dual capacity in which Schultz was acting in no way affects the merits of this litigation. As to the law, the case would be the same if he were alone a member of the hardware firm, or alone the superintendent of the defendant. Schultz's dual capacity in no way changes the contractual relations between these various parties. Indeed, in no aspect of the case were there any contractual relations existing between the defendant and Fontaine as to the repairing of the tank. Defendant could not discharge him from the work. Only Schultz & Wilson could do so. Defendant was not paying him for his labor, for Schultz & Wilson were paying him. There being no contractual relation between Fontaine and defendant, it is impossible in law that Fontaine should be the servant of defendant.

Section 2009 of the Civil Code provides: "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." Schultz & Wilson were not the servants of defendant, tested by this section. Defendant could not be termed their master, for they were doing this work in the pursuit of an independent calling; and this being so, they were independent contractors, and Fontaine was their servant: See Shearman and Redfield on Negligence, sec. 81. Adam & Kibbe employed McGearey to take down a flagstaff from their building. In an action for damages brought by a third party for injuries received in taking down the flagstaff, it was held that McGearey was an independent contractor, and alone liable: *Ahern v. McGearey*, 79 Cal. 44, 21 Pac. 540. That case is similar in principle to the case at bar: See, also, *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017. Upon the part of respondent it is insisted that the verdict of the jury is conclusive as to the capacity in which Fontaine was acting in repairing the tank. This contention could only be sound if there was a substantial conflict in the evidence. But here, as to this particular branch of the case, there is no conflict in the evidence. And upon a state of facts of that character it becomes ⁴⁶⁰ the duty of the appellate court to decide, as matter of law, what the facts prove.

The declarations of Hedge, the deceased, made to third parties after the accident, form no part of the *res gestae*, and should not have been admitted against these plaintiffs. The

case being remanded, it becomes unnecessary to consider the legal soundness of the instructions given to the jury upon the point.

For the foregoing reasons the judgment and order are reversed and the cause remanded.

Harrison, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion thereon on the second day of March, 1901:

BEATTY, C. J. I dissent from the order denying a rehearing. The conclusion that Fontaine was the servant of independent contractors is fully sustained by the record, but it does not dispose of the case. Respondents charged negligence in the selection of a person to do this work who was unacquainted with the properties of distillate and its gases. Their contention is, that in any operation involving the use of dangerous means or the handling of dangerous explosives the employer of an independent contractor is bound to exercise care in the selection of a person who knows the danger and how to guard against it. They cite a number of authorities to sustain this proposition—cases in which the employer has been held liable for injuries caused by blasting, etc., by incompetent contractors.

In view of the evidence in this record, which shows that both Schultz and Fontaine were entirely ignorant of the danger involved in lowering a lighted lantern into a large tank recently filled with distillate, and still containing about a gallon of that substance in liquid form, and therefore necessarily surcharged with its vapors or gas, it is manifest that the question of negligence is not disposed of by merely holding ⁴⁶¹ that the work was being done by independent contractors, if it is true that the employer in such cases is liable for want of care in selecting a proper person to do the work. I think, therefore, that the cause should not be remanded for a new trial, leaving this question open. Its decision is necessarily involved in the ultimate determination of the controversy, and in my opinion, is necessarily involved in the disposition of this appeal.

A MASTER IS NOT ORDINARILY ANSWERABLE for the negligence of an independent contractor's servant: See the monographic note to *Covington etc. Bridge Co. v. Steinbrock*, 76 Am. St. Rep. 385, on liability for negligence and other torts of independent contractors; *Berg v. Parsons*, 156 N. Y. 109, 63 Am. St. Rep. 542, 50 N. E. 957.

DECLARATIONS AS PART OF RES GESTAE—PROXIMITY IN POINT OF TIME.—To make declarations part of the *res gestae* they must be contemporaneous with the main fact, though not precisely concurrent in point of time: *State v. Arnold*, 47 S. C. 9, 58 Am. St. Rep. 867, 24 S. E. 926. No two cases are exactly alike, and each must depend upon its own circumstances. Exact coincidence of time is not required. A declaration is seldom, if ever, absolutely simultaneous with the act it illustrates: See the monographic note to *People v. Vernon*, 95 Am. Dec. 51, 58, on *res gestae*. See, also, the extended note to *State v. Molisse*, 58 Am. Rep. 184-194. If the declarations spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous: *State v. Arnold*, 47 S. C. 9, 58 Am. St. Rep. 867, 24 S. E. 926. Declarations made five and one-half hours after the happening of an accident are not admissible as part of the *res gestae*: *Purcell v. Chicago etc. Ry. Co.*, 109 Iowa, 629, 77 Am. St. Rep. 557, 80 N. W. 682.

ESTATE OF CAMP.

[131 Cal. 469, 63 Pac. 736.]

ADOPTION—NATURE OF PROCEEDINGS.—Proceedings for the adoption of a minor are not judicial, and the order of a judge therein is not the judgment of a court, but a superior judge designated by the code to hear and determine such proceedings exercises judicial functions.

JURISDICTION—DETERMINATION OF FACT—COLLATERAL ATTACK.—When the jurisdiction of an inferior or special tribunal, or its power to act in any particular case, depends upon the existence of a fact which is to be established before it by extrinsic evidence, the determination of that fact by the tribunal cannot be questioned in a collateral attack upon its order.

ADOPTION—ABANDONMENT AS A JURISDICTIONAL FACT—COLLATERAL ATTACK UPON ORDER OF COURT.—Whether children have been abandoned by their parents is a jurisdictional fact to be determined by the judge upon the evidence presented to him, before he is authorized to entertain a petition for their adoption. A recital in his order that it appears to his satisfaction that they have been so abandoned is a determination of this fact which cannot be questioned in a collateral attack upon the order.

ADOPTION—CONTEST OF, ON APPLICATION FOR LETTERS OF ADMINISTRATION—INADMISSIBLE EVIDENCE.—Upon an application for letters of administration upon the estate of an adopting father of minor children, where the adoption proceedings, including the order of the judge sanctioning the adoption,

are read in evidence, a brother of the deceased will not be allowed to introduce evidence showing that, at the time of the proceedings, the children had not in fact been abandoned by their parents.

Dixon L. Phillips, for the appellant.

R. Irwin and Hudson & Pryor, for the respondent.

470 HARRISON, J. Applications for letters of administration upon the estate of the above-named decedent were presented to the superior court of Kings county by the public administrator of that county, the respondent herein, and also by the appellant, a brother of the deceased. Upon the hearing thereon the court made an order appointing the respondent as such administrator, and directing letters of administration to issue to him. The brother has appealed.

The deceased died intestate, leaving several brothers and sisters and a surviving widow and two adopted children, who at the hearing of the petition were aged respectively about eleven and eight years. The widow died shortly before the petitions were presented. At the hearing the proceedings taken in the lifetime of the decedent for the adoption of the children, including the order of the judge sanctioning their adoption, and declaring that they should thereafter be regarded and treated as the children of the decedent and his wife, were read in evidence. In reply thereto the appellant offered to introduce evidence showing that at the time the proceedings were had the children had not in fact been abandoned by their parents. The court excluded this evidence, and the appellant urges that in this ruling the court erred.

While the proceedings for the adoption of a minor child do not constitute judicial proceedings, and the order of the judge therein is not the judgment of a court, yet under section 227 of the Civil Code, the judge of the superior court has been designated as a tribunal for that purpose, and in the performance of his duties thereunder exercises judicial functions. It is a well-settled rule that when the jurisdiction of an inferior or special tribunal, or its power to act in any particular case, depends upon the existence of a fact which is to be established before it by extrinsic evidence, the determination of that fact by the tribunal cannot be questioned in a collateral attack upon its order: Wells on Jurisdiction, sec. 61; Brittain v. Kinnaird, 1 Brod. & B. 432; Evansville etc. R. R. Co. v. Evansville, 15 Ind. 421; Barnard v. Barnard, 119 Ill. 92, 8 N. E. 320; In re Grove Street, 61 Cal. 438; Levee Dist. No. 9 v. Farmer,

101 Cal. 178, 35 Pac. 569; *People v. Reclamation Dist.*, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

⁴⁷¹ Whether the children had been abandoned by their parents was a jurisdictional fact to be determined by the judge upon the evidence presented to him before he was authorized to entertain the petition for their adoption, and the recital in his order that it appeared to his satisfaction that they had been abandoned by their parents was a determination of this fact which cannot be questioned in a collateral attack upon the order. Otherwise the existence of this fact and the status of the children would be always uncertain, since the evidence might not be the same at all investigations, and might be regarded with different effect by different tribunals, and the adoption be held by one court to have been valid, while another court would hold it to have been of no avail. Whether the parents of the child in a direct proceeding against the adopting person for the recovery of the persons of the children would be bound by this determination of the judge, is not involved herein. It is very clear that, if an action had been brought against the decedent in his lifetime for necessities supplied for the support of the children, he would not have been permitted to show in his defense that at the time of the proceedings for their adoption the parents had not in fact abandoned them. He would have been estopped by his recital of their abandonment in his petition. Inasmuch as the rights of the appellant herein are derived solely through and under the decedent, he can have no greater right to question the validity of the order than would the decedent.

The order is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

ADOPTION—NATURE OF PROCEEDING.—The act of adopting a minor is not a judicial proceeding in California, and the order therefor is in no sense the judgment of a court: *In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

ADOPTION — JURISDICTION — COLLATERAL ATTACK—ESTOPPEL.—When a proper petition has been filed in adoption proceedings, the court acquires jurisdiction, and its determination of matters therein is not subject to collateral attack: *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; *Nugent v.*

Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. 23. The person adopting a minor child and procuring the order for such adoption, and all others claiming as his heirs, are estopped from denying that he was a resident of the county as alleged in his petition for such adoption: *In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407. See the monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 218, on the adoption by one person of the children of another.

JURISDICTION—EXTRINSIC EVIDENCE IN SUPPORT OF.—

Facts necessary to show that a court or board of limited or special jurisdiction has acted within its jurisdiction may be proved by other competent evidence in the absence of a statute requiring such facts to appear in the minutes or other records of its proceedings; and this rule applies to the adoption of minors: *In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

JOOST v. CRAIG.

[131 Cal. 504, 63 Pac. 840.]

NOTARIES—OFFICIAL MISCONDUCT OR NEGLIGENCE—LIABILITY.—A notary public and the sureties on his official bond are answerable in damages to parties injured by the officer's official misconduct or neglect.

NOTARIES—FALSE CERTIFICATE—LIABILITY.—A notary public and the sureties on his official bond are answerable in damages to one who relies upon the officer's certificate of acknowledgment to a forged deed, which certificate falsely states that the person who made the acknowledgment was known by the officer to be the person described in the instrument, and whose name was subscribed thereto.

NOTARIES—RIGHT TO RELY UPON CERTIFICATE—NEGLIGENCE.—A person is not guilty of negligence in relying upon the certificate of a notary public. The presumption is that the officer has done his duty. Hence, one who buys property and takes a deed therefor is not negligent in paying over the money without further inquiry as to the identity of the grantor, though the deed turns out to be a forgery, where the notary's certificate of acknowledgment certifies, though falsely, that the person who made the acknowledgment was known by the officer to be the person described in the instrument, and whose name was subscribed thereto, and where the purchaser has no reason to doubt the truthfulness of the certificate.

NOTARIES—IDENTITY OF UNKNOWN PERSONS—PROOF OF.—The Civil Code of California expressly forbids a notary public from taking an acknowledgment unless he knows that the person making it is the one described in the instrument. If he does not know this of his own personal knowledge, it must be proved by the oath of a credible witness, known to the notary, and whose name must be stated in the certificate. It is not enough that the person making the acknowledgment be introduced to the notary by a responsible party. To take an acknowledgment upon such introduction without the oath is negligence sufficient to render the notary and his sureties answerable, if the certificate turns out to be untrue, and injury results by reason thereof.

EVIDENCE — SHIFTING OF BURDEN. — SLIGHT EVIDENCE is sufficient to shift the burden of proof of a fact from the plaintiff to the defendant, where the knowledge of such fact is peculiarly within the knowledge of the defendant, and which, in the nature of things, it would be difficult for the plaintiff to prove.

Mullany, Grant & Cushing, for the appellant.

Denson, Oatman & Denson, Denson & Schlesinger, and W. T. Baggett, for the respondents.

505 **TEMPLE, J.** This is an action against a notary public and his sureties for damages charged to have resulted from the negligence of the notary.

506 As appears from the record, in April, 1891, one Fisher, who was a real estate broker in San Francisco, as such broker offered to sell to plaintiff ten lots of land situate in San Mateo county, then standing in the name of Charles A. Anderson. The lots were part of the Abbey Homestead Association's lands. Plaintiff was familiar with these lands and had bought a portion of them. He contracted with Fisher at once for the property, agreeing to pay one thousand dollars for it, conditioned, as usual, upon the title. He had an abstract made, and finding that the title of Anderson was good, informed the broker that he would pay whenever he received a deed from Anderson properly executed.

A deed was produced, apparently executed by Charles A. Anderson, and acknowledged before the defendant notary, and certified by him as follows:

"On this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one, before me, Lee D. Craig, a notary public in and for said city and county, duly commissioned and sworn, personally appeared Charles A. Anderson, known to me to be the person described in, whose name is subscribed to, who executed the within and annexed instrument, and he duly acknowledged to me that he executed the same," etc.

In the body of the deed the grantor is described as "Charles A. Anderson, of Redwood City, county of San Mateo, state of California."

It turned out that the deed was a forgery, and was not executed or acknowledged by Charles A. Anderson, of Redwood City, or by any person known by that name, but the name of Charles A. Anderson was written by one Frank C. Koen.

Plaintiff accepted the deed and paid his money, relying solely upon the certificate of the notary. The lots were of the market

value of one thousand dollars. The plaintiff, through his reliance upon the certificate, paid the said sum of one thousand dollars, which was thereby lost.

It is provided in section 801 of the Political Code that: "For the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained." This statute sets at ⁵⁰⁷ rest one of the contentions of respondent that in taking an acknowledgment a notary acts judicially, and is, therefore, not liable in damages for mere negligence.

At the trial the court, on motion of defendants, granted a nonsuit on the ground: "That it appears from the evidence that plaintiff was guilty of such negligence as to put it beyond his power to recover anything from defendants." This ground implies that in other respects the case for plaintiff was made out. There could not be contributory negligence unless there was first negligence to which it contributed.

There was no evidence which tended to show negligence on the part of the plaintiff, except that when the deed, apparently executed by Anderson, acknowledged before the defendant notary, and certified as above set out, was delivered to him by Fisher, he paid over the money to Fisher without further inquiry as to the identity of the grantor. This was not negligence on the part of plaintiff. He had a right to rely upon the certificate of the notary and to presume without question that such officer had done his duty. No circumstance was brought to his attention which could raise a suspicion to the contrary. There was nothing which could have put the most prudent man upon inquiry. And the notary cannot excuse his negligence, under such circumstances, by the claim that the party who has been injured has trusted to his faithful performance of duty. The whole theory that the record of such instruments gives constructive notice of the contents of recorded instruments is founded upon the proposition that upon proper investigation the genuineness of such instruments has been determined. The certificate is also received as evidence in a trial in a court of law that the deed is genuine. If the deed is not genuine, but is forged, the notary and his sureties ought to be held for all damages unless they have taken the precautions expressly required by the statute. The legislature has taken great care, though, considering the importance of the matter, not too great, to make this certificate reliable. Section 1185 of the Civil Code provides as follows: "The acknowledgment of an instrument

must not be taken unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the ⁵⁰⁸ individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation."

The notary is expressly forbidden to take the acknowledgment unless he knows that the person making the acknowledgment is the person described in the instrument. Here such person was described as Charles A. Anderson, of Redwood City. If he did not know this it should have been proven by the oath of a credible witness, whose name must be stated: Civ. Code, sec. 1189.

It is not enough that the person be introduced to the notary by a responsible person. If that were enough there would be no purpose in requiring the oath, for such person could always furnish the introduction. This point has been often decided, although sufficiently obvious from the statute. To take an acknowledgment upon such introduction without the oath is negligence sufficient to render the notary liable in case the certificate turns out to be untrue.

The matter was considered in *Jones v. Bach*, 48 Barb. 568. It is there said: "The object of all these well-considered provisions relative to the proof and recording of conveyances of real estate was to protect owners of property and their creditors against forgery, as well as to secure the rights of grantees and mortgagees against spurious and fraudulent conveyances. Would this object be effected by the manner in which the acknowledgment in this case was made? Anyone could be falsely personated without check or liability to punishment for crime if a mere introduction at the moment shall authorize the officer to take the acknowledgment. The person who introduces, if the statement be false, only commits a falsehood; but if he is sworn as to the truth of his statement, should it be knowingly false, he is guilty of perjury, and liable to a prosecution for a felony." The statute of New York there considered was not as clear on this proposition as ours. It did not expressly require the oath, but only "satisfactory evidence." But even under that language it was held that a mere introduction is not enough. The certificate here gave assurance that the notary knew of his own knowledge, and not upon mere hearsay, ⁵⁰⁹ that the grantor was Charles A. Anderson, of Redwood City.

If this certificate was not true, the notary should be held. The same matter was discussed in *State v. Meyer*, 2 Mo. App. 413. The court makes some suggestions as to what degree of acquaintance will authorize the notary to certify that he has personal knowledge, and also upon the proposition that an introduction, even by a responsible person, could not be relied upon, and says: "It is obvious that when an officer taking an acknowledgment and making a certificate assumes any such fact, he does it at his own risk. The law warns him when he has not 'personal knowledge' of his own to resort to certain observances which the law supposes to be sufficient in practice to prevent imposition. . . . But such a certificate is infinitely less liable to deceive or mislead than a declaration that the party making the acknowledgment is well known to the officer making the certificate. It puts all persons upon inquiry, and furnishes a clue for conducting it; and it complies with the law." This makes the certificate upon personal knowledge a guaranty of the genuineness of the instrument, and the court adds: "It is perfectly idle for him to protest that he did not know or suspect that his certificate was false. That may be taken for granted, but it is nothing to the purpose. His business was to know that it was true."

A notary may take all due precautions and fully comply with the statute and still be deceived. In such case he would not be held liable, but if he has not fully complied with the statute, the rule announced above is not a whit too stringent.

This case was followed and commented upon in *State v. Balmer*, 77 Mo. App. 463.

It may be here remarked that the witness by whose oath the execution of an instrument is proven when the person executing the instrument was not previously known to the officer must himself be known to the notary. This is implied by the requirement that the officer shall certify that such person is a credible witness. When these necessary facts do not exist, the notary is expressly prohibited from taking the acknowledgment at all. When the notary does not obey this statute he should expect to be held liable. And I wish to repeat, these requirements ⁵¹⁰ are of great importance to the business world, and not at all too exacting.

Oakland Bank v. Murfey, 68 Cal. 455, 9 Pac. 843, is not in conflict with these views. Murfey took the acknowledgment to a deed of one who personated the true owner, and signed his name to the instrument. The deed did not run to the imposter

by his true name, but was taken by him to the president of the bank and an application was made for a loan. The imposter then assumed the name of the fictitious grantee named in the forged deed. The president of the bank, after getting an abstract of the title, caused a note and mortgage to be prepared, and it was signed by the imposter in the bank, and was there acknowledged before a bank clerk who was a notary. This acknowledgment was taken and certified by the employé of the bank by the express direction of the bank president who made the loan for the bank. The present case would have resembled that had Joost taken the imposter to the notary and requested him to acknowledge and certify to the execution of the deed, upon the mere introduction to him by Joost. Such introduction would not have justified the officer, or have constituted a defense to a suit by a grantee of Joost, but by the rule announced in that case Joost would, under the circumstances supposed, have been guilty of contributory negligence.

There is no ground for such a contention here. Fisher, a real estate broker, knowing that Joost was desirous of purchasing land in the homestead tract, informed him of the opportunity, and upon being furnished the deed certified by Craig, as notary, he paid his money. Even had Fisher been the agent of Joost, there is nothing to show that he had any reason to doubt the truthfulness of the certificate. It does not appear, as it did in the Oakland case, that Fisher knew that the certificate falsely stated that the officer knew that the person making the acknowledgment was the person described in the instrument. Had this statement in the certificate been true there could have been no imposition.

It is argued that the judgment of nonsuit should be affirmed, because it was not proven that some person known to the notary as Charles A. Anderson did not appear before the notary and make the acknowledgment. Had such been the fact it would ⁵¹¹ not have been enough. The person might be known to him as Charles A. Anderson, though introduced to him. The certificate states, in effect, that the notary knew him to be Charles A. Anderson, and the person described in the instrument, to wit, Charles A. Anderson, of Redwood City.

The nonsuit was expressly granted because of supposed negligence on the part of Joost. As already stated, this implies that the court was satisfied that the certificate was false, and there was some evidence tending to establish such fact. It was shown that Charles A. Anderson, of Redwood City, did not

execute the deed, and did not appear before the notary, and the signature was forged by Keon, who had and exhibited the deed before the acknowledgment was made. Keon furnished the deed to Fisher, and received the money. This was a fact peculiarly within the knowledge of the defendant notary, and which, in the nature of things, it would be difficult for plaintiff to prove. Under such circumstances slight evidence is sufficient to shift the burden of proof: *People v. Lundin*, 120 Cal. 308, 52 Pac. 807.

The judgment is reversed and a new trial ordered.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Liability of Notaries.

Generally.—When a notary public accepts his office, he holds himself out to the world as a person competent to perform the duties connected therewith, and he contracts with those who may employ him that he will perform such duties with integrity, diligence, and skill: *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714. But he is not liable as a notary for acts done in his individual capacity: See "Liability of Sureties," *infra*. Thus, if one buys land and leaves its price with a notary, the latter, in the absence of proper instructions given to and accepted by him, is not liable for paying the money over to the ostensible owner and vendor: *McCoy v. Weber*, 38 La. Ann. 418. But a notary is liable in damages where he undertakes, for a consideration, to have a chattel mortgage recorded, and the lien thereof is lost through his failure to perform such undertaking: *Stott v. Harrison*, 73 Ind. 17. His liability as a notary extends only to acts done officially, and the cases defining this liability are not numerous.

A notary is liable for a libel. Thus, the protest, by a notary public, of a draft for nonacceptance, before due presentment for payment, is unauthorized, and its publication is a libel, for which the notary is liable in an action by the acceptor, who alleges that the protest and its publication were falsely, fraudulently, and maliciously made, and calculated to injure him in his credit and business: *May v. Jones*, 88 Ga. 308, 30 Am. St. Rep. 154, 14 S. E. 552. But the language which a notary usually employs in protesting a note is not libelous per se, especially when it appears therefrom that the note was protested before it had fully matured: *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452, 29 Am. St. Rep. 660, 18 S. W. 743.

In Reference to Negotiable Paper.—A notary who fails to make a protest of negotiable paper when it is required is liable for loss occasioned thereby: *Henderson v. Smith*, 26 W. Va. 829, 53 Am.

Rep. 139; Neal v. Taylor, 9 Bush, 380. He is also liable for neglecting to give proper or effective notice to the parties to be charged in case of dishonor: Henderson v. Smith, 26 W. Va. 829, 53 Am. Rep. 139; Bowling v. Arthur, 34 Miss. 41; Marston v. Bank of Mobile, 10 Ala. 284; Commercial Bank v. Varnum, 3 Lans. 86; Tevis v. Randall, 6 Cal. 632, 65 Am. Dec. 547; Hyde v. Planters' Bank, 17 La. Ann. 560, 36 Am. Dec. 621. In such matters he is regarded as standing in precisely the same position as any other agent who may be employed about a particular business, and will be held answerable for his negligence and mistakes when loss is occasioned thereby to the party employing him: Henderson v. Smith, 26 W. Va. 829, 53 Am. Rep. 139.

It is the official duty of a notary to give notice of protest: Wheeler v. State, 9 Helsk. 393; and he is liable for giving a false notice of dishonor: Bank of Mobile v. Marston, 7 Ala. 108. Compare May v. Jones, 88 Ga. 308, 30 Am. St. Rep. 154, 14 S. E. 552, above cited. A notary is not chargeable with negligence if he can show that the protest was made in conformity with the practice and law of the state wherein the bill is payable: Wiseman v. Chiappella, 23 How. 368, 380; and, to fix upon him liability for a loss occasioned by his negligence in failing to make protest and to give notice, the loss must be shown to have been on account of his want of skill or diligence: Neal v. Taylor, 9 Bush, 380. Neither is a notary presumed to be a lawyer who is to revise or reverse the decision of his employer as to the character of a bill, and as to whether it is entitled to grace or not. Hence, no cause of action arises against him for following instructions in making demand and protest of a bill upon the wrong day: Commercial Bank v. Varnum, 49 N. Y. 269. Nor is a notary answerable for negligence in making a further demand of the maker of a note, where there has already been a previous valid demand, sufficient to charge the indorsers: Warren Bank v. Parker, 8 Gray, 221. A party cannot recover of a notary for the latter's neglect to protest a note legally where the former was himself guilty of laches, enabling the maker to defeat the claim on the ground that it was barred by the statute of limitations: Emmerling v. Graham, 14 La. Ann. 390. So, if a plaintiff sustains no loss from a notary's omission to give notice to an indorser, or need not have sustained any with ordinary attention to the case, the notary is not liable to him; and, if he is fully advised of a ground of sustaining an action against the indorser independently of the notice, and willfully or negligently omits to avail himself of it, he cannot subsequently sustain an action against the notary: Franklin v. Smith, 21 Wend. 624. A notary employed to present a note and to give notice of dishonor is not required to hunt up the parties: Parke v. Lowrie, 6 Watts & S. 507.

A bank which receives commercial paper as an agent for collection properly performs its duty, in case of nonpayment, by putting it into the hands of a notary, to be so proceeded with as to charge

the parties thereto, and to secure the rights of the owner. The bank is, therefore, according to the weight of authority, not answerable for the notary's failure to discharge his duty, but the notary, being a subagent of the holder, is himself directly answerable to the latter for any loss occasioned through his negligence: *May v. Jones*, 88 Ga. 308, 30 Am. St. Rep. 154, 14 S. E. 552; *Hyde v. Planters' Bank*, 17 La. Ann. 560, 36 Am. Dec. 621; note to *Isham v. Post*, 38 Am. St. Rep. 776; *Bellemire v. Bank of United States*, 4 Whart. 105, 33 Am. Dec. 46, 1 Miles, 173; *Bowling v. Arthur*, 34 Miss. 41; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592; but there are states in which the relations of a collecting bank and the notary are deemed to be those of principal and agent, and in which the bank is therefore held answerable for negligence or other misconduct on the part of the notary, through which the owner of the paper suffers loss: See the monographic note to *Minneapolis etc. Co. v. Metropolitan Bank*, 77 Am. St. Rep. 627, on the duties of banks acting as collecting agents.

In Reference to Acknowledgments.—It is the duty of a notary or other officer taking an acknowledgment of any party to an instrument in writing to exercise care to avoid a mistake as to the identity of the cognizor, and, when he is not acquainted with such party, to require satisfactory evidence of his personality before certifying to the fact that he is satisfied of it. No one has a right to be satisfied of such a fact, when the interests of third persons are involved, upon anything short of legal evidence. That is, the cognizor must be personally known to the officer, or he must be proved to be the person whose name is subscribed to the instrument by the requisite number of witnesses prescribed by the statute: *State v. Meyer*, 2 Mo. App. 413, per Gantt, P. J.; and see the principal case. "Non-compliance with the formalities enjoined by the statute, and the assumption of any fact which afterward proves to be no fact at all will subject the officer to all the risks attendant on the negligent performances of official duty. It may be very courteous to waive all such formalities; it may be disagreeable to speak plainly and tell a party that one is not willing to assume that he is not falsely personating another; but no one is at liberty to practice courtesy or gain popularity, to indulge his own indolence, or avoid unpleasant things at the expense of others. If these others sustain loss by his laxity, it is impossible to listen to assurances from him that he meant well and really did not know better, where it was his plain duty to probe the matter to the bottom, and not to certify at all until he knew what he was talking about. It is perfectly idle for him to protest that he did not know or suspect that his certificate was false. His business was to know that it was true": *State v. Meyer*, 2 Mo. App. 413, 421.

A notary is therefore liable, in case of loss, for falsely certifying, in an acknowledgment, as to the identity of the cognizor with the grantor: See the principal case; *State v. Balmer*, 77 Mo. App.

463; *State v. Plass*, 58 Mo. App. 148; *State v. Meyer*, 2 Mo. App. 413; *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131. When a notary takes an acknowledgment and makes a certificate in which he assumes the identity of the person making the acknowledgment to be the same as that of the grantor, he does it at his own risk. "The law warns him, when he has not 'personal knowledge' of his own, to resort to certain observances which the law supposes to be sufficient in practice to prevent imposition. The very lowest of these observances is proof by two witnesses who possess such personal knowledge of the identity of the cognizor with the grantor, for the statute says, cautiously, 'at least two credible witnesses'": *State v. Meyer*, 2 Mo. App. 413, 420. Hence, it is seen "that, in a case of any doubt, it is not only permissible, but imperative, that the number of witnesses should be increased; that not only their number but their credit must be looked to by the officer; that, as their testimony is to be taken, they must be sworn; and that, to secure them for future reference, their names and places of residence must be stated in the certificate": *State v. Meyer*, 2 Mo. App. 413, 420. If a notary certifies that he knows a person whom he does not know, on the mere introduction of some party, and loss results therefrom, and from false personation, he and his sureties must make it good: See the principal case; *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131; *State v. Balmer*, 77 Mo. App. 463; *State v. Meyer*, 2 Mo. App. 413; unless the plaintiff was negligent. Thus, if a notary certifies that a party who acknowledged before him the execution of a mortgage was known to be the person whose name was subscribed thereto, the notary and his sureties cannot be charged with liability for the notary's negligence in making such a certificate; although such party falsely and fraudulently personated the owner of the mortgaged land, if he was introduced to the notary by the plaintiff's agent, who negotiated the loan for the plaintiff, as being the man who owned the land and signed the mortgage: *Overacre v. Blake*, 82 Cal. 77, 22 Pac. 979. "Not only the doctrine of contributory negligence, but the doctrine of estoppel also applies to close the mouth of the plaintiff from asserting any claim against the sureties of the notary in such a case": *Overacre v. Blake*, 82 Cal. 77, 22 Pac. 979.

The neglect of a notary to certify that a party acknowledging an instrument is known to him, or was identified, is not excused by the fact that the certificate was partially filled by the attorney for the grantee; and, as a party has a right to rely on a notary's certificate, he cannot be charged with knowledge of a defect therein from having received the conveyance from the notary and retained it for some time in his possession: *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714. The clerk of a probate court is liable for loss resulting from his false statement in a certificate to an acknowledgment to a forged mortgage that the person whose name appears as having executed it was personally known to him, and that he appeared be-

fore him in person and acknowledged the same as his act and deed: *People v. Bartels*, 138 Ill. 322, 27 N. E. 1091.

A notary, however, is not liable in damages for a false certificate of acknowledgment unless the plaintiff affirmatively and clearly shows a clear and intentional dereliction of duty: *Commonwealth v. Haines*, 97 Pa. St. 228, 30 Am. Rep. 805. He is not liable for certifying that one who impersonates the owner and mortgagor of land was known to him to be a person stated, and who signed the mortgage, where the proof fails to show that such person's true name was not as represented by him and certified by the notary: *State v. Ryland*, 72 Mo. App. 468; *Browne v. Dolan*, 68 Iowa, 645, 27 N. W. 795. Nor is he liable for making a false acknowledgment of a forged mortgage where no loss is shown by the plaintiff: *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131. He is not answerable for his negligence in making a certificate of acknowledgment to a chattel mortgage, whereby the mortgage lien is lost, if the property was wholly valueless: *McAllister v. Clement*, 75 Cal. 182, 16 Pac. 775; and he is not liable for his negligence in falsely certifying as to the identity of the grantor in a deed, if such negligence was not the direct or proximate cause of the loss resulting from a reliance upon the certificate: *Oakland Bank v. Murfey*, 68 Cal. 455, 9 Pac. 843. Under the Iowa statute, a notary is not liable for making a false certificate of acknowledgment without he does so both negligently and "knowingly": *Scotten v. Fegan*, 62 Iowa, 236, 17 N. W. 491. See, also, *Wyllis v. Haun*, 47 Iowa, 614, 620; *Browne v. Dolan*, 68 Iowa, 645, 27 N. W. 795. And in West Virginia no action lies against a notary for defectively certifying a married woman's acknowledgment of a deed, unless he acted maliciously or corruptly: *Henderson v. Smith*, 26 W. Va. 829, 53 Am. Rep. 139. A cause of action for making a false and fraudulent certificate of acknowledgment to a mortgage accrues at the time of the making of the false certificate, and is barred after the statutory period of time has elapsed: *Bartlett v. Bullene*, 23 Kan. 606.

Criminal Liability.—If a notary officially certifies to be true what he knows to be false, he is guilty of a crime, and may be punished therefor: *Succession of Tete*, 7 La. Ann. 95. In Louisiana, he may be suspended for any just cause: *State v. Laresche*, 28 La. Ann. 26; and, in Texas, he may be indicted for "falsely assuming" and "pretending" to be a notary; but it is error for the court, in its instructions, to make the defendant's guilt or innocence depend, not on his belief, intent, or honesty of purpose, but on the reasonableness of his belief: *Brown v. State*, 43 Tex. 478. If a notary, in ignorance of the law, makes a premature protest of a note, and for so doing takes the ordinary and usual fees charged for protesting, such taking is not extortion within the meaning of the criminal statute, nor can the amount paid be recovered back, the payment having been voluntarily made: *Hirshfeld v. Fort Worth Nat. Bank*, 83 Tex. 452, 29 Am. St. Rep. 660,

18 S. W. 743. Section 5421 of the United States Revised Statutes punishes one who falsely makes or forges an affidavit in support of a pension claim, and not one who makes a false affidavit. Hence, the fact that a jurat or certificate to an affidavit in support of a pension contains false statements made by a notary who signs such jurat or certificate does not constitute an offense under such section. The making of an official certificate containing statements known to be untrue is another and distinct offense: *United States v. Glasener*, 81 Fed. 566. "To falsely make an affidavit is one thing; to make a false affidavit is another. A person may falsely make an affidavit, every sentence of which may be true in fact; or he may actually make an affidavit, every sentence of which shall be false. It is the false making which the statute makes an offense, and this is forgery as described in all the elementary books": *United States v. Cameron*, 8 Dak. 182, 13 N. W. 561.

Liability of Sureties.—The condition in a notary's bond that he will "well and truly perform and discharge the duties of a notary according to law" embraces every act which he is authorized or required by law to do in virtue of his office: *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714; and a condition in his official bond for the faithful performance of the duties of his office is sufficient, where the statute prescribes no condition for such bonds: *Tervis v. Randall*, 6 Cal. 632, 65 Am. Dec. 547.

The sureties on the official bond of a notary are liable only to such persons as have employed him, and who have suffered injury on account of his failure to perform a duty incumbent on him or required and authorized by law: *Schmitt v. Drouet*, 42 La. Ann. 1064, 21 Am. St. Rep. 408, 8 South. 396; and a recovery on a bond or instrument given by a notary, but not under seal, was denied in *Castelee v. Cornwall*, 5 Cal. 419. A suit may be maintained against a surety upon a notary's joint and several bond, for a breach of its conditions, without a prior adjudication against the principal or making him a party defendant: *Doran v. Butler*, 74 Mich. 643, 42 N. W. 278.

It is the official duty of a notary to give notice of protest, and a failure to discharge this duty is a breach of his bond: *Wheeler v. State*, 9 Heisk. 393; *Tervis v. Randall*, 6 Cal. 632, 65 Am. Dec. 547. The notary is a public officer, and he and his sureties are answerable to parties injured by his neglect: *Bellemire v. Bank of United States*, 1 Miles, 173. Thus, if he forges two notes and the evidence establishes beyond contradiction that it was as a notary that he forged the notes, that as a notary he forged the signature of the parties to the act, and that it was his signature as a notary which gave to the notes that form and that character without which they could not have been converted into money, his sureties cannot be released from liability to anyone who has been

injured by his act: *Rochereau v. Jones*, 29 La. Ann. 82. In this case it was forcefully said: "High and important functions are intrusted to notaries; they are invested with grave and extensive duties; they are charged with the solemn preparation of the authentic evidence of our transactions, of last wills, of those titles which pass from one generation to another. Their responsibility is as high as their trust, and a notary who officially certifies as true what he knows to be false violates his duty, commits a crime, forfeits his bond, binds himself, and binds his sureties": *Rochereau v. Jones*, 29 La. Ann. 82, 86.

A notary who omits to state in his certificate that the party acknowledging was known to him or identified is guilty of gross and culpable negligence; and is liable on his official bond to the party injured for all damages resulting from such negligence. So, a notary who affixes his official signature and seal to a certificate of acknowledgment without examining it, to find whether the facts certified are true, is guilty of negligence, and liable on his official bond for damages arising therefrom: *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714; *People v. Colby*, 39 Mich. 456. And if a notary falsely certifies the acknowledgment of a grantor, who has not appeared before him, it is a breach of the conditions of his official bond, and the sureties thereon are answerable: *State v. Plass*, 58 Mo. App. 148; *People v. Colby*, 39 Mich. 456. So, if a notary claims to be the agent of mortgagors to receive the money, and signs a mortgage with the names of the mortgagors without authority, and makes a false certificate of acknowledgment to the mortgage, representing to the mortgagee's agent, of whom he has negotiated the loan, that the mortgage is genuine, both as to signatures and acknowledgment, whereupon the notary receives the money but fails to pay it over, the condition of his bond, to faithfully discharge the duties of his office, is broken, and the sureties thereon are answerable for the loss, the false certificate being the proximate cause of the injury: *People v. Butler*, 74 Mich. 643, 42 N. W. 273.

If a notary does a thing which the law does not authorize him to do, although he does so *eo nomine*, in his capacity of a notary, the sureties on his bond are not liable: *Schmitt v. Drouet*, 42 La. Ann. 1064, 21 Am. St. Rep. 408, 8 South. 396; as where the notary acts outside of his official duty: *Saloy v. Hibernia Nat. Bank*, 39 La. Ann. 90, 1 South. 657. If interested parties deposit funds with a notary, and he fails to account for those funds, his sureties are not answerable; and why? Because, as his office is not one of deposit, he was trusted with and received the deposit, not as an officer, but as an individual: *Rochereau v. Jones*, 29 La. Ann. 82, 85. His sureties are not liable for his failure to account for moneys left with him to erase mortgages, as such an act is no part of his official duty: *Lescouzeve v. Ducatel*, 18 La. Ann. 470; and see *Saloy v. Hibernia Nat. Bank*, 39 La. Ann. 90,

1 South. 657; nor are they liable for his failure to pass money or checks left with him to another, as such an act forms no part of his duties as a notary: *Monrose v. Brocard*, 20 La. Ann. 78. A purchaser who pays the price to a notary incurs the risk of the deposit, and it is his loss where the notary embezzles the money: *Brown v. Schmidt*, 7 La. Ann. 349. It is no part of a notary's official duty to receive money from or for anybody. His sureties are, therefore, not liable for money fraudulently obtained and retained by him: *Heldt v. Minor*, 89 Cal. 115, 26 Pac. 627, 629. If he embezzles money left in his charge for the purpose of being loaned out on real estate security, and then delivers to his principal notes and deeds of trust, forged by the notary in the names of persons having no existence, and to which he has, as a notary, attached false certificates of acknowledgment, there can be no recovery by the principal in an action on the notary's bond, where the principal never parted with any value on the faith of the notary's official acts: *State v. Boughton*, 58 Mo. App. 155. If a notary is also a real estate agent, engaged in negotiating loans, and procures money, by false representations, upon forged mortgages to which he has attached false certificates of acknowledgment, which money he fraudulently retains, his sureties are not answerable for the amount of money thus obtained and retained by him, but only for the loss resulting from the fact that the certificates are false instead of true: *Heldt v. Minor*, 89 Cal. 115, 26 Pac. 627, 629. The sureties of a notary are not answerable for his negligence in failing to record a mortgage without a showing that some injury has been suffered: *Dwyer v. Woulfe*, 40 La. Ann. 46, 3 South. 360. A notary public is not authorized by law, nor is it a duty incumbent upon him, to write officially on any note or utter any certificate that a prolongation of payment of a debt has been allowed by an act before him; hence the surety on his official bond is not liable for such act, even if such certificate is shown to be false: *Schmitt v. Drouet*, 42 La. Ann. 1064, 21 Am. St. Rep. 408, 8 South. 396. If a garnishment is pending before a notary, having the jurisdiction of a justice of the peace, in aid of the collection of a judgment rendered by him, and the garnishee, in his answer, admits an amount to be due the defendant, the notary acts outside of his official duty in collecting such amount from the garnishee prior to judgment against him, and such collection would impose no liability on his sureties; but if he should collect the money by falsely pretending to the garnishee that he had rendered judgment against him, and had authority to receive the money, his act would be a wrongful one, done under the color of his office, and rendering him and his sureties liable in a suit against them brought by the defendant in the original judgment, for the restitution of the money, the recovery, however, being limited to the money received, with interest thereon: *Mason v. Orabtree*, 71 Ala. 479. Compare *Rochereau v. Jones*, 29

La. Ann. 82; *People v. Butler*, 74 Mich. 643, 42 N. W. 273, above cited.

Measure of Damages.—The mere act of wrongfully protesting a promissory note before it is due gives a right of action for nominal damages only, where no special damages are alleged: *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452, 29 Am. St. Rep. 660, 18 S. W. 743. The measure of damages in an action against a notary for failing to give notice of the dishonor of paper according to his undertaking, must be graduated by the injury sustained by the neglect, and the insolvency of the party to whom the notice should have been given is an important element in estimating such injury: *Bank of Mobile v. Marston*, 7 Ala. 108. A notary is liable on his bond for nominal damages where he falsely certifies that grantors named have acknowledged a deed, but the plaintiff, who has relied upon such certificate to his injury, cannot recover substantial damages, in an action on the officer's bond, where the ostensible grantors were myths, having no title to the land which they purported to convey, and where no persons of their names ever owned the land: *State v. Plass*, 58 Mo. App. 148.

The measure of damages in an action against a notary for his omission to state in his certificate of acknowledgment of a mortgage that the party acknowledging was known to him, or was identified, is the amount of the debt and interest intended to be secured by the mortgage: *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714. If a notary fraudulently attaches to counterfeit mortgages certificates of their due acknowledgment, upon the faith of which the mortgagee loans money, the measure of damages, in an action against the sureties of the notary for his fraudulent act, is the value of the mortgages, if they had been valid; but if the court does not find that they would be of any value if valid, the proper basis for determining the liability of the defendants is wanting: *Heidt v. Minor*, 89 Cal. 115, 26 Pac. 627, 629; yet, if the mortgagor is solvent, the measure of damages is the face value of the mortgage debt regardless of the mortgagor's interest in the mortgaged property. The value of a mortgage is the amount which can and will be collected thereon, and it matters not whether that amount is obtained by a sale of the mortgaged premises or by the enforcement of a deficiency judgment: *Heidt v. Minor*, 113 Cal. 385, 45 Pac. 700. In an action against a notary who is an attorney and who has undertaken, for a consideration, to have a chattel mortgage recorded, but who fails to comply with his undertaking, whereby the lien of the mortgage is lost, the amount for which the mortgaged property was sold on execution is not conclusive as to its value against the plaintiff, where the latter was a stranger to such writ, and adversely interested: *Stott v. Harrison*, 73 Ind. 17.

O'DONNELL v. MERGUIRE.

[131 Cal. 527, 63 Pac. 847.]

EXECUTION—WHEN NOT AMENDABLE AND THEREFORE VOID.—THE SUBSCRIPTION of the clerk of the court is essential to a valid execution. Hence, if there is no such subscription, as where the writ is issued in the name of an ex-clerk instead of that of the incumbent, the execution is not amendable, as the seal of the court is insufficient to authenticate it.

Reed & Nusbaumer, for the appellant.

Charles Wesley Reed and King & Hornblower, for the respondent, Reid.

528 THE COURT. Appeal from an order granting the defendant a new trial.

The suit was brought to quiet title to lands described in the complaint. The defendant Reid claimed title in himself. Both parties deraigned title from one Thomas O'Donnell, the husband of plaintiff—the plaintiff, by deed of conveyance of date July 14, 1891; the defendant Reid by a sheriff's sale under an execution against Thomas O'Donnell. The defendants' case is based on the claim that the former conveyance was in fraud of creditors, and hence void as against the subsequent execution sale to him. The findings negatived the allegations of fraud, and found in favor of the plaintiff on the issue of title. The new trial was granted presumably upon the ground that the evidence was insufficient to justify the finding that the conveyance of O'Donnell to the plaintiff was not fraudulent as to creditors. But as the conveyance is specifically found, the finding as to fraud can be material only upon the assumption of the validity of the subsequent sheriff's sale to the defendant. Otherwise the plaintiff's ownership follows as a conclusion of law, from the conveyance to the plaintiff from O'Donnell—the common source of title—and the alleged fraud is immaterial. The alleged writ of execution, under which defendants' **529** title was deraigned, was regular in all respects except that it was signed "M. C. Haley, Clerk, by B. D. Dougherty, Deputy Clerk," and not by C. F. Curry, who was the clerk at the date of the alleged execution. Haley was a former clerk, and his signature, "M. C. Haley, Clerk," was in print; and it was admitted that Dougherty was the deputy of Curry, as he had been also of Haley. The question is thus presented whether

the document in question was a valid execution, sufficient to confer power on the sheriff to sell and to convey the land.

The power of courts to amend writs issuing from them, when defective or irregular, has long been exercised, and in modern times with increasing frequency; nor is it easy to prescribe definite limits to the power (1 Freeman on Executions, sec. 63); and it is also settled that, if the writ be amendable, it will be accorded the same effect with reference to acts done in execution of it, as if it had been amended: 1 Freeman on Executions, sec. 71b; Hunt v. Loucks, 38 Cal. 374, 99 Am. Dec. 404. The question therefore is, whether the omission of the subscription of the clerk to the writ of execution—as required by section 682 of the Code of Civil Procedure—can be amended. If so, it cannot be regarded as void; otherwise it must be so regarded.

The question, we think, admits of an obvious answer. The power of amendment, however extensive it may be, is limited to the amendment of the writs of the court, which can be authenticated only, under provisions of the law similar to ours, by the subscription of the clerk. Without this there is nothing “which the judge can affirm” is an execution “issued upon the judgment produced”: Hunt v. Loucks, 38 Cal. 374, 99 Am. Dec. 404. Under the ancient practice, where the seal of the court was in the custody of a particular officer and sedulously guarded, and when seals were habitually used for the purpose of authenticating instruments, a seal alone may have been sufficient to authenticate an execution—as in fact was the case in the king’s bench—though in the more modern court of common pleas the signature of the prothonotary was required: Tidd’s Practice, 999, 1027. But in modern times the seal has lost its significance, and cannot be regarded as a sufficient authentication ⁵³⁰ without the signature of the officer affixing it. Whether both seal and subscription of the clerk—as required by the code—be essential, is a question about which the authorities differ (1 Freeman on Executions, sec. 70), and which it is unnecessary, in this case, to determine. But we are of the opinion that the seal by itself is insufficient, and that the subscription of the clerk is an essential part of the writ, without which there is no execution to be amended.

On this point also there is some conflict in the authorities, which are discussed by the author in the work cited, section 45; but the preponderance seems to be in favor of the conclusion we have reached: Huggins v. Ketchum, 4 Dev. & B. 414; Short

v. State, 79 Ga. 550, 4 S. E. 852; Hernandez v. Drake, 81 Ill. 34; Wooters v. Joseph, 137 Ill. 113, 31 Am. St. Rep. 355, 27 N. E. 80; Dearborn Laundry Co. v. Chicago etc. Ry. Co., 55 Ill. App. 438; Dwight v. Merritt, 18 Blatchf. 305, 4 Fed. 614.

The order granting a new trial must therefore be reversed and it is so ordered.

Beatty, C. J., dissented.

EXECUTION—NOT PROPERLY SIGNED—VALIDITY—AMENDMENT.—An execution not signed by the officer authorized to issue it is not a valid process of court: Rawles v. Jackson, 104 Ga. 593, 69 Am. St. Rep. 185, 30 S. E. 820. An execution issued by the clerk of a court other than the one entering judgment, unless authorized by some special statute, is void: Willamette Real Estate Co. v. Hendrix, 28 Or. 485, 52 Am. St. Rep. 800, 42 Pac. 514. An execution cannot be amended as to matters of substance: Blanks v. Rector, 24 Ark. 496, 88 Am. Dec. 780. Void process cannot be amended: Durham v. Heaton, 28 Ill. 264, 81 Am. Dec. 275.

CADY v. PURSER.

[131 Cal. 552, 63 Pac. 844.]

RECORDING OF INSTRUMENTS—MUST BE IN THE PROPER BOOK.—If the grantee of an interest in land would protect himself against subsequent purchasers or encumbrancers, he must give notice of his interest, either actual or constructive; and in giving constructive notice, it is incumbent upon him to comply with all the statutory requirements prescribed for such notice, one of which is the correct transcription of the instrument into the appropriate book.

RECORDING OF INSTRUMENTS.—A RECORDER IS THE AGENT OF THE PERSON WHO RECORDS AN INSTRUMENT, for the purpose of correctly transcribing it into the appropriate book of record, and errors or omissions of the former in making such transcription are, in law, the errors and omissions of the latter.

THE RECORDING OF A MORTGAGE IN THE WRONG BOOK is not constructive notice to anyone.

RECORDING OF INSTRUMENTS—TITLES BY PRESCRIPTION.—The provisions of the recording act are not limited to titles which appear of record, but are applicable as well to those which exist by virtue of prescription.

EVIDENCE OF TITLE—WHAT IS PRIMA FACIE.—The possession of land by a corporation at the time of a sheriff's sale thereof is prima facie evidence of its title.

MORTGAGES—FORECLOSURE—EXTINGUISHMENT OF THIRD PERSON'S RIGHTS.—A sale under foreclosure does not extinguish the rights of a third person, acquired subsequently to the date of the mortgage, where the mortgagee failed to record

his mortgage until after such person had acquired an interest in the land.

MORTGAGES NOT RECORDED—FORECLOSURE—EFFECT OF, AS TO RIGHTS ACQUIRED BY A THIRD PERSON. A mortgage not properly recorded, as where the record thereof is made in the wrong book, is void as against one who buys the land at a sheriff's sale and who immediately records his interest therein. The latter's rights cannot, therefore, be affected by a subsequent judgment of foreclosure and sale.

MORTGAGES—FORECLOSURE—ADVERSE TITLE.—A paramount and adverse title is not a proper subject for adjudication in an action for the foreclosure of a mortgage, and this includes a title which is adverse to that which the mortgagee brings before the court.

MORTGAGES—FORECLOSURE—WHAT TITLE IS ADVERSE.—A title may be paramount and superior to the title of the mortgagee, although acquired after the date of the mortgage, and if after the execution of the mortgage a purchaser from the mortgagor acquires a title which is superior to that of the mortgagee, that title is adverse to the mortgagee's title.

ESTOPPEL—ACTION TO QUIET TITLE—PURCHASER AT SHERIFF'S SALE—MORTGAGE NOT RECORDED.—The paramount title of the purchaser at a sheriff's sale is not a proper subject for adjudication in a subsequent action to foreclose a mortgage given before such sale, but not properly recorded; and where there was, in fact, no adjudication in an action by such purchaser to quiet title, upon the issue as to whether the title of the plaintiff was subordinate to the claim of the mortgagee, the plaintiff is not estopped from asserting his superior title against the purchaser under the decree of foreclosure.

Goodwin & Goodwin, for the appellant.

A. L. Shinn, for the respondents.

554 HARRISON, J. Suit to quiet title. Each party to the action claims title to the land in controversy under the Eagle Lake Land and Irrigation Company, a corporation—the plaintiff by virtue of a sheriff's deed under two judgments rendered against the corporation, and the defendant by virtue of a sheriff's sale under a judgment foreclosing a mortgage executed by the corporation. Judgment was rendered in favor of the defendants, and plaintiff has appealed.

The plaintiff obtained a judgment against the corporation upon a money demand, June 13, 1893, and at the sheriff's sale under an execution issued thereon, purchased the lands described in the complaint herein on February 23, 1894, and the sheriff's certificate therefor was delivered to him and recorded March 5, 1894, and the deed thereon, August 24, 1894. Charles Hartson obtained a judgment against the corporation July 14, 1893, and at the sheriff's sale under an execution issued thereon purchased the same lands and received the sher-

iff's certificate therefor, which was recorded February 19, 1894. The sheriff's deed upon this certificate was executed to the plaintiff December 21, 1894, by virtue of an assignment of the certificate to him made by Hartson, March 29th. May 24, 1892, the corporation executed a mortgage upon the lands to the defendant Purser. This mortgage was filed for record in the office of the county recorder on November 22, 1892, and was ~~555~~ recorded in book "A" of "Bills of Sale and Agreements." March 26, 1894, Purser commenced an action to foreclose this mortgage, making Cady and Hartson defendants therein. Judgment was thereafter rendered in this action for a sale of the mortgaged premises in satisfaction of Purser's claim, but declaring that "said foreclosure sale shall be without prejudice to any and all prior and paramount rights of the said defendants, except the defendant Eagle Lake Land and Irrigation Company." At the sale under this judgment Purser purchased the lands, and afterward received a sheriff's deed therefor.

1. Under the foregoing facts it must be held that at the time the plaintiff and Hartson purchased the lands at the sheriff's sale, they did not either of them have any notice of the mortgage from the corporation to Purser. Whether subsequent purchasers or mortgagees are charged with constructive notice of the contents of an instrument that has been filed for record in the recorder's office, notwithstanding such instrument is afterward incorrectly or improperly copied into the books kept therefor, has been decided differently in different states, but it was held at an early day in this state, and must be regarded as a settled rule, that they have constructive notice of only such matters as appear from the instruments as copied into the proper books. In *Chamberlain v. Bell*, 7 Cal. 292, 68 Am. Dec. 260, it was held that an instrument which was incorrectly transcribed by the recorder did not give constructive notice of its contents to a subsequent purchaser, but that such purchaser had the right to rely upon the instrument as it appeared upon the face of the record. In *Donald v. Beals*, 57 Cal. 399, the court said that where there is a conflict between the actual record as it appears in the record book, and the constructive record by the indorsement made upon the instrument at the time it was deposited for record, the latter must give way to the former. In *Watkins v. Wilhoit*, 104 Cal. 395, 38 Pac. 53, it was held that an assignment for the benefit of creditors was sufficiently recorded, so far as creditors are concerned, by a compliance with section 1170

of the Civil Code, but it was also said that to be effective against subsequent purchasers or mortgagees, and so as to give them constructive ⁵⁵⁶ notice, it must be recorded in accordance with the provisions of section 1213 of the Civil Code. *Meherin v. Oaks*, 67 Cal. 57, 7 Pac. 47, cited by the respondent, was an action against the sheriff for an unlawful seizure and sale of mortgaged property, contrary to section 2969 of the Civil Code, and did not involve any question of the rights of a subsequent purchaser. It appeared that before the sale by the sheriff the mortgagee gave him actual notice of the existence of the mortgage, and the decision went upon the ground that he was thereby put upon inquiry. Having received actual notice of the mortgage, there was no place for the doctrine of constructive notice, and what the court said with reference to section 1170 was irrelevant. The principle upon which the rule rests is, that as under the provisions of the recording act, if the grantee of an interest in lands would protect himself against subsequent purchasers or encumbrancers, he must give notice of his interest, and as the statute provides for constructive notice in the place of actual notice, it is incumbent upon him to comply with all the requirements prescribed for such constructive notice, one of which is the correct transcription of the instrument into the appropriate book: *Neslin v. Wells*, 104 U. S. 428; *Terrell v. Andrew County*, 44 Mo. 309. For this purpose the recorder is the agent of such grantee, and the errors or omissions of the recorder in making such transcription are his errors or omissions in the same manner as are the errors of a sheriff in executing a writ, or of a clerk in recording an order or a judgment.

The provision in section 1170 of the Civil Code, that "an instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office with the proper officer, for record," must be read in connection with the provisions of section 1213, that "every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees," and each must be construed with reference to the purposes for which it was enacted. Section 1170 is a part of article 2 of the chapter on recording transfers, which treats of the "Mode of Recording," and designates the time at which the instrument shall ⁵⁵⁷ be deemed to be recorded; while section 1213 is in article 4, which treats of the "Effect of Recording or the Want Thereof,"

and specifies the conditions under which such effect will be given to the instrument. For the purpose of complying with a statutory requirement, as in the case of official bonds or certificates of marriage, where the evident purpose of the statute is to make the instrument a matter of public record, or when the recording of an instrument is an essential step in perfecting some right or completing some act of the party, as in the case of a declaration of homestead, or an assignment for the benefit of creditors, the depositing of the instrument in the recorder's office is sufficient; but, when merely making a record of the instrument is not the ultimate purpose of the party, but the recording of the instrument is the means by which his ultimate purpose is to be carried into effect, as when his purpose is to give notice of his interest in real estate, section 1213 requires not only that the instrument shall be filed with the recorder for record, but that it shall also be "recorded as prescribed by law." By this requirement, in order that constructive notice of the contents shall be given to subsequent purchasers and mortgagees, the legislature must have intended something in addition to depositing the instrument in the recorder's office for record, since that had already been provided for in section 1170. The word "recorded" in ordinary usage signifies copied or transcribed into some permanent book. In Anderson's Law Dictionary the term "recording" is defined "copying an instrument into the public records in a book kept for that purpose by or under the superintendence of the officer appointed therefor."

By section 124 of the County Government Act as it stood at the time of these transactions (Stats. 1891, p. 324), the recorder was required to "record separately in large and well-bound separate books" the several instruments there named, and section 130 provided that when any instrument was deposited in his office for record, he "must record the same without delay." By section 125 the recorder is required to keep indexes to the several instruments, among which are two indexes labeled, respectively, "Mortgagors of Real Property," and "Mortgagees of Real Property," with the pages divided and so headed as to ⁵⁵⁸ show the parties and date and place of record of each mortgage. In addition to this, section 1171 of the Civil Code provides: "Grants absolute in terms are to be recorded in one set of books and mortgages in another." These provisions of the statute fully indicate that an instrument is not "recorded as prescribed by law" until it has been transcribed into the proper

book. The policy of the law in this respect is to afford facilities for intending purchasers or mortgagees of land in examining the records for the purpose of ascertaining whether there are any claims against it, and for this purpose it has prescribed the mode in which the recorder shall keep the records of the several instruments; and an instrument must be recorded as herein directed in order that it may be recorded as prescribed by law. If recorded in a different book from the one directed, it is to be regarded the same as if not recorded at all. In *Sawyer v. Adams*, 8 Vt. 172, 30 Am. Dec. 459, where an instrument was copied into a book that had not been in use for recording purposes for many years, it was held that the book was improper for that purpose and that the instrument was not "duly recorded," the court saying: "The act of the town clerk was as wholly inoperative as if he had written this deed on a slate, or copied it into his family record." The same principle was declared in *New York Life Ins. Co. v. White*, 17 N. Y. 469. In *Gillig v. Maass*, 28 N. Y. 191, a mortgage recorded in a book of deeds was held not to be duly recorded, and therefore not to give constructive notice of its existence. There is no provision in the statutes of this state authorizing the recorder to transcribe any instrument in a book entitled "Bills of Sale and Agreements," and the above provisions requiring him to record mortgages in separate books, and to keep indexes of such records, lead to the conclusion that the record of the mortgage to Purser was ineffective for giving constructive notice of its contents.

It is immaterial that the corporation's title to the premises did not appear of record in the recorder's office. The provisions of the recording act are not limited to titles which appear of record, but are applicable as well to those which exist by virtue of prescription. The possession of the land by the corporation ⁵⁵⁹ at the time of the sheriff's sale was prima facie evidence of its title.

2. The rights acquired by the plaintiff under the sheriff's sale were not affected by the judgment in the action of Purser for the foreclosure of his mortgage, or by the sale under this judgment. By virtue of the provisions of section 1214 of the Civil Code, the omission of Purser to have his mortgage properly recorded rendered it void as against the plaintiff. The plaintiff, purchasing at a sale under his own judgment, was a bona fide purchaser for value, and the certificate of sale was a conveyance by which an interest in the property was created.

and, as it was immediately recorded, it had priority over the mortgage to Purser: *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680. There was no record of the Purser mortgage prior to the action for its foreclosure.

It has been stated in several cases that the effect of a sale under a judgment in foreclosure is to transfer to the purchaser the title of the mortgagor as it existed at the date of the mortgage, and that in an action for its foreclosure the rights of defendants which were acquired subsequent to its date are extinguished by such sale; and it is contended by the respondents that, as the rights of the plaintiff herein were acquired subsequent to the execution of the Purser mortgage, and, as he was a defendant in the suit for its foreclosure, his rights so acquired were extinguished by the sale under the judgment in that action. These expressions in reference to the effect of a sale under foreclosure were, however, but the statement of a general principle in which only the ordinary facts and the usual conduct of parties were to be considered, but are inapplicable in the consideration of an unusual state of facts or conduct, as where the mortgagee fails to record his mortgage until after a third person has acquired an interest in the land. It would be a harsh rule of procedure to hold that the foreclosure of a mortgage which the statute had declared to be void would extinguish the interest of such third person. The principle is well settled that paramount and adverse titles are not proper subjects for adjudication in actions for the foreclosure of a mortgage. The adverse title here referred to is not limited to one which is adverse to the title which was in the mortgagor at the date of the mortgage, but includes a title that is adverse to that which the mortgagee brings before the court. A title may be paramount and superior to the title of the mortgagee, although acquired after the date of the mortgage, and, if after the execution of the mortgage, a purchaser from the mortgagor acquires a title which is superior to that of the mortgagee, that title is adverse to the mortgagee's title. The provision in section 1214 of the Civil Code, by which the failure of the mortgagee to record his mortgage renders it "void" as against subsequent purchasers or mortgagees, deprives it of all consideration in reference to its date, and requires it to be treated as if it had been executed subsequent to the record of the subsequent purchaser. Being void as against him, neither its date nor its contents can be available to defeat his title. As against the plaintiff herein the mortgage of Purser had no existence until

the commencement of his action for its foreclosure: *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680; *Emeric v. Alvarado*, 90 Cal. 444, 468-471, 27 Pac. 66; *Duff v. Randall*, 116 Cal. 231, 58 Am. St. Rep. 158, 48 Pac. 66.

The title of the plaintiff being, therefore, adverse and superior to that held by Purser, the plaintiff was not a necessary party to the foreclosure, and, although he was made a party, the facts presented upon the record were insufficient to render the judgment against him a bar to his assertion herein of his superior title. The complaint simply alleged that he had or claimed to have some interest in the lands, but that such claim was "subsequent, subject, and subordinate to the lien of the plaintiff." In his answer thereto the plaintiff herein denied this allegation, and affirmatively alleged that his claim was not subsequent, subject, or subordinate to the plaintiff's lien. The court made no finding upon this issue, but merely found that the defendants claimed some interest in the premises, and in its judgment expressly decreed "that said foreclosure sale shall be without prejudice to any and all prior and paramount rights of the defendants, except the defendant Eagle Lake Land and Irrigation Company." There was, therefore, no adjudication upon the issue whether the title of the plaintiff herein was subordinate to the claim of the mortgagee, ⁵⁶¹ and the plaintiff is, therefore, not estopped thereby from asserting in this action his claim of title to the lands purchased by him at the sheriff's sale: *Beronio v. Ventura County Lumber Co.*, 129 Cal. 232, 79 Am. St. Rep. 118, 61 Pac. 958. As we have seen that his title hereby acquired is superior to that derived under the mortgage, the provisions in the decree foreclosing all persons having liens subsequent to the lien of the plaintiff therein is inapplicable to the plaintiff herein, and the superior court erred in holding that the plaintiff herein has no title to the lands, and in rendering judgment in favor of the defendants.

The judgment and order denying a new trial are reversed.

Garoutte, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

RECORDING OF DEEDS AND MORTGAGES—NECESSITY OF. An unrecorded deed is good against everybody but creditors and purchasers without notice: *Vose v. Morton*, 4 Oush. 27, 50 Am. Dec. 750. The registration of a conveyance is not necessary to pass the legal title to the grantee as against the grantor, but is necessary as against creditors and subsequent purchasers: *Portis v. Hill*, 30

Tex. 529, 98 Am. Dec. 481; *Stevens v. Brown*, 3 Vt. 420, 23 Am. Dec. 215. A deed not recorded within the time prescribed by statute is void as against creditors: *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519. If a mortgage is unregistered, a bona fide purchaser from the mortgagor takes the land free of the encumbrance; so, also, his grantees who purchase after registration of the mortgage: *Jackson v. McChesney*, 7 Cow. 360, 17 Am. Dec. 521. A mortgage not acknowledged, proved, and recorded, as required by statute, though good between the parties, is not valid as against subsequent purchasers or encumbrancers with actual notice of the existence of the mortgage: *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494. An unrecorded mortgage is no lien on land as against an execution levied thereon, or a sale thereunder: *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475.

RECORDING OF DEEDS AND MORTGAGES—PROPER BOOK AND INDEX—CONSTRUCTIVE NOTICE.—A deed or mortgage must be legally recordable and duly recorded according to law, to make the record thereof constructive notice: *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772. An irregular registration of a deed is not notice: *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436. The recording of an absolute deed, when intended as a mortgage, must be in the book of mortgages, or it will not impart notice: *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475. An absolute deed with a defeasance should be recorded in the book of mortgages, otherwise no benefit is derived from the recording of the instrument: *Grimstone v. Carter*, 8 Paige, 421, 24 Am. Dec. 230. But instruments in writing not required by law to be recorded in a particular book may be recorded in any book kept by the recorder: *Farabee v. McKerrihan*, 172 Pa. St. 234, 51 Am. St. Rep. 734, 33 Atl. 583. In order that a deed may constitute constructive notice it must be duly and properly recorded and indexed, the index being an essential part of the record: Note to *Davis v. Whitaker*, 41 Am. St. Rep. 795. The omission to index a mortgage or deed, in Iowa, deprives the record of the quality of imparting implied notice: Note to *Barney v. McCarty*, 83 Am. Dec. 435. Compare the monographic note to *Green v. Garrington*, 91 Am. Dec. 106-110, on the effect of defects in the registration of conveyances.

POSSESSION OF REALTY IS NOTICE OF TITLE: Notes to *Springfield etc. Assn. v. Roll*, 81 Am. St. Rep. 362; *Parker v. Conner*, 45 Am. Rep. 188.

MORTGAGE — FORECLOSURE — LITIGATING ADVERSE TITLE.—A suit to foreclose a mortgage is not an appropriate proceeding in which to litigate questions of adverse or paramount title: *Farmers' Nat. Bank v. Gates*, 83 Or. 388, 72 Am. St. Rep. 724, 54 Pac. 205.

WARNER BROTHERS COMPANY v. FREUD.

[181 Cal. 639, 63 Pac. 1017.]

APPEAL FROM JUDGMENT WHICH HAS BEEN PAID. A party against whom a judgment has been rendered is not prevented from appealing by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal, and his appeal will not be dismissed because of such payment.

APPEAL.—RESTITUTION UPON REVERSAL.—RELEASE OF ERRORS.—AS PAYMENT OF A JUDGMENT must be regarded as a matter of compulsion, it does not release errors, and the parties will be restored to their rights where the judgment is reversed upon appeal.

APPEAL FROM JUDGMENT AGAINST ADMINISTRATRIX PAID BY HER.—If a judgment against an administratrix and other devisees directs her to pay the same within sixty days or forfeit her interest in certain land to the plaintiff, who was a successor of a devisee, and who had redeemed from a sale made under the foreclosure of a mortgage executed by the decedent, and she does pay it, she does not thereby lose her right of appeal, where there was no compromise, no concession by the respondent, and no condition imposed or assurance given that the appeal would not be prosecuted. Such payment is not only prudent, but may well be regarded as compulsory.

ESTOPPEL.—PAYMENT OF JUDGMENT.—DISMISSAL OF APPEAL.—If an administratrix pays a judgment against her, but the plaintiff refuses to give a receipt except as for so much money paid by her, without referring to the judgment, he is estopped from saying, for the purpose of dismissing her appeal, that the judgment has been satisfied, and that, for that reason, the appeal should be dismissed. He cannot for one purpose refuse to acknowledge satisfaction of the judgment, and for another purpose insist that it is satisfied.

W. S. Goodfellow and W. B. Bosley, for the appellants.

Hart H. North, Henry E. Monroe, and W. B. Treadwell, for the respondent.

640 **THE COURT.** The respondent moves to dismiss the appeal upon the ground "that after the taking of said appeal the appellant, Tiny Freud, administratrix with the will annexed of the estate of Morris Freud, deceased, voluntarily paid to the respondent, and the respondent accepted, the whole sum of money specified in the decree appealed from, thus effecting a satisfaction of said decree."

The motion is made upon the transcript and an affidavit showing that on August 12, 1899, said administratrix paid to the respondent twelve thousand two hundred and nine dollars and sixty-seven cents for the purpose of satisfying the judgment

appealed from, and that the money was accepted and the judgment satisfied.

Without stating the facts so fully as might appear to be necessary if the merits of the appeal were now under consideration, the following will suffice for the purposes of this motion.

Morris Freud died testate in 1882, seised of certain real estate which he had mortgaged to the German Savings and Loan Society. By his will he devised to his wife, Tiny Freud, a life estate in said real estate, with remainder to five children in equal proportions, and said Tiny Freud is the administratrix with the will annexed of said estate. After the death of Morris Freud the bank foreclosed its mortgage, and on May 31, 1898, the property was sold thereunder, the bank becoming the purchaser. The respondent, having purchased the interest of one of the remaindermen, on November 30, 1898, as a successor in interest of the mortgagor, redeemed the property by paying to the bank the full amount of eleven thousand six hundred and nine dollars and forty-four cents, and afterward brought the present action against Tiny Freud, as administratrix and also in her personal capacity, and against each of the other devisees, praying that the amount of said redemption money which each of the defendants should severally pay be ascertained, and that in default of such payment by a day to be fixed by the court each of the defendants so defaulting to be forever barred and foreclosed of all interest in the premises.

The answer alleged that the interest which the plaintiff purchased from said devisee was subject to the payment of the debts, charges, and expenses of administration, and that there are such debts, charges, and expenses remaining unpaid.

The court found the proportion of the redemption money that should be paid by each of the defendants, and decreed that in default of payment within sixty days the interest of the defendant so defaulting should vest "absolutely and forever, unconditionally, in the plaintiff."

From said judgment all the defendants appealed, and it is that appeal that respondent seeks to dismiss. The grounds upon which said motion is based have already been stated in the notice of motion and in the affidavit of Mr. North in support of the motion.

In opposition to the motion is an affidavit of Mr. Bosley, one of appellant's attorneys, stating very fully the circumstances under which said redemption money was paid by the administratrix, from which it appears that Mr. Bosley, Mr. Good-

fellow, and Mr. Vandall went to the office of Mr. North, the attorney in fact of respondent, taking with them the money required to effect the redemption, a written tender, and a form of receipt to be executed by Warner Brothers Company, by its attorney in fact, and its attorneys, entitled in the court and cause, and the body of which is as follows:

“Received from Mrs. Tiny Freud, administratrix with the will annexed of the estate of Morris Freud, deceased, the sum of twelve thousand two hundred and nine dollars and sixty-seven cents paid by her pursuant to the terms of the decree entered in the above-entitled action and in full satisfaction of the amount provided to be paid by her as such administratrix by the terms of said decree.”

Dated August 12, 1899.

The receipt that was given by respondent is as follows:

“San Francisco, August 12, 1899.

“Received from Tiny Freud, as administratrix of the estate of Morris Freud, dec’d, twelve thousand two hundred nine and 67-100 dollars.

“(Signed) WARNER BROS. CO., a Corp.,

“Per HART H. NORTH,

“Its Attorney in Fact.”

This receipt made no reference to the action or the decree or to any purpose for which the money was paid; but to all requests that the receipt prepared by the administratrix should be signed the reply was, “You have your receipt.” Mr. Treadwell, of counsel for respondent, said, in effect, that they did not propose to sign anything or do anything that would enable appellant to get any of the money back; that it was their point that the administratrix had no right to effect redemption without an order of court.

The facts stated in Mr. Bosley’s affidavit were not replied to.

It will be observed that in the notice of motion to dismiss this appeal there is no statement that the money was received or paid in satisfaction of the decree but simply that the payment ⁶⁴³ was voluntary, and the money accepted, “thus effecting a satisfaction of said decree”; and the affidavit of Mr. North is equally careful to avoid any statement that it was received in satisfaction of the judgment appealed from, though he concludes his affidavit with the legal conclusion “whereby the said judgment became and is satisfied.”

In an affidavit made by said Tiny Freud in opposition to said motion it is shown that in August, 1900, she filed a petition in the superior court for partial distribution of the estate of Morris Freud in which she alleged that the land described in the judgment appealed from in this action was the community property of herself and said Morris Freud; that the corporation, respondent herein, appeared and filed an opposition to her said petition, in which it was denied that said property was community property, and alleged that in an action commenced by said corporation against said Tiny Freud and all other persons interested in the estate, the superior court, on June 17, 1899, duly made and entered its decree, whereby it was adjudged, among other things, that the interest of Tiny Freud in said real property was a life estate only, and that she had no other interest therein. Her affidavit then proceeds to state that in the present case, in which said judgment was rendered, there was no issue as to whether said real estate was community property, and that she intends to file a supplemental brief and ask that the judgment be reversed or modified in so far as it may be held to determine that she had only a life estate therein.

The appeal in this case is taken by all the defendants, viz., Tiny Freud, Rosa Vogelsdorf, Hannah Freud, Emily Elaiser, Tiny Freud, as administratrix with the will annexed of the estate of Morris Freud, deceased, and Emma Freud, as executrix of the last will and testament of Isaac Freud, deceased. The judgment specifies the amount to be paid by each of these defendants, and divested the estate of each one who should not pay within sixty days. The appeal is from the whole of the judgment. The alleged satisfaction of the judgment was made by Tiny Freud, as administratrix. It does not appear that any other of the appellants consented to the payment. We see no ground upon which the respondent has any right to have the appeal dismissed as to any of the appellants, unless it be as to the administratrix. It is shown that there are debts, charges, ~~and~~ and expenses of the estate of Morris Freud unpaid. It was her duty to protect the estate as far as possible. If she failed to pay the amount required by the judgment to be paid by her as administratrix, and this court should affirm the judgment, the estate would have been lost to the heirs and creditors. We think she was not bound to determine at her peril what the judgment of this court would be upon the questions of law involved. There was no compromise, no concession by respondent, no condition imposed or assurance given that the appeal

would not be prosecuted. On the contrary, respondent expressly refused to sign a receipt acknowledging satisfaction of the judgment; nor has it since offered to give or sign an acknowledgment of satisfaction, nor has any satisfaction of said judgment been entered of record; while the statement of its counsel at the time the money was paid, to the effect that nothing would be signed or done that would enable appellants to get their money back, and that the administratrix had no right to effect redemption without an order of court, would seem to imply that respondent did not intend that the payment should be the end of the matter. But, however that may be, the repeated refusals of respondent to acknowledge satisfaction of the judgment estops it from saying, for the purposes of this motion, that the judgment has been satisfied, and that for that reason the appeal should be dismissed. It cannot for one purpose refuse to acknowledge satisfaction of the judgment, and for another purpose insist that it is satisfied.

In *Hayes v. Nourse*, 107 N. Y. 577, 579, 1 Am. St. Rep. 891, 14 N. E. 508, it was said: "It must be deemed too well settled by authority to require further discussion that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal."

In *Erwin v. Lowry*, 7 How. 184, the supreme court of the United States said: "Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our ⁶⁴⁵ knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." Upon this point the foregoing is approved in *O'Hara v. O'Connell*, 93 U. S. 150, 154.

In *Hayes v. Nourse*, 107 N. Y. 577, 1 Am. St. Rep. 891, 14 N. E. 508, the court further said: "The statute giving the right to appeal only requires that the judgment shall be final, that the appeal shall be taken within one year after it is entered, and, anticipating such a case as that now presented, provides that if the judgment appealed from is reversed, the appellate court may make or compel restitution. The same rule

prevailed before the code, and it was applied whether the judgment was paid before or after writ of error brought. The only difference was in the manner of proceeding to inform the court of the facts on which the right to restitution depended."

Freeman, in his work on Judgments, section 480a, says: "One against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice, and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. The better view, we think, is, that though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of the right to appeal."

In the case at bar the court found that the real estate sold under the mortgage to the bank and redeemed by respondent, Warner Brothers Company, is of the value of twenty-five thousand dollars. The amount paid on August 12, 1899, to respondent, twelve thousand two hundred and nine dollars and sixty-seven cents, was less than one-half the value of the property. The judgment was a strict foreclosure of respondent's claim arising out of its redemption from the foreclosure sale, and under the judgment from which this appeal is taken, unless reversed, or satisfied by payment, the property would become forfeited to respondent. The payment made by administratrix, under these circumstances, was prudent, and might well be regarded as compulsory.

⁶⁴⁶ In support of the motion respondent cites several California cases, none of which conflict with those above cited. *Morton v. Superior Court*, 65 Cal. 496, 498, 4 Pac. 489, was considered in *Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 41, where it was said that *Morton v. Superior Court*, 65 Cal. 496, 4 Pac. 489, "was a collateral attack upon the judgment by way of certiorari, and did not involve the right of appeal from a judgment that had been satisfied," and that "section 1049 of the Code of Civil Procedure cannot be invoked to abridge the right of appeal, where a judgment has been satisfied against the will of appellant."

People v. Burns, 78 Cal. 645, 21 Pac. 540, and *In re Baby*, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405, cited by respondent, were cases where the fruits of the judgment had been received by the appellant. It was held in *Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 41, that in such cases "a party in whose favor a judgment has been rendered cannot enforce the judg-

ment, and while enjoying its benefits appeal therefrom and seek its reversal."

So in *Vermont Marble Co. v. Black*, 123 Cal. 23, 55 Pac. 600, it was said: "Appellant first contends that the judgment was satisfied within the meaning of section 1049 of the Code of Civil Procedure, by the execution sale, but this position is not tenable. The judgment was not in fact satisfied, and a forced payment by execution sale against a nonconsenting judgment debtor cannot be held to abridge any of his rights upon appeal"; and *Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 41, was cited.

San Diego School Dist. v. Supervisors, 97 Cal. 438, 32 Pac. 517, cited in support of the motion, is broadly distinguishable from the present case. That was mandamus to compel the supervisors to levy a tax for school purposes. The board levied the tax pursuant to the judgment, and afterward appealed from the judgment which they had executed. This court granted the motion to dismiss the appeal, saying: "A reversal of the judgment would not of itself set aside the levy of the tax which had been made, nor did the appellant, by its compliance with the judgment, lose any property or rights of which restitution could be made in case of reversal: Code Civ. Proc., sec. 957. The proceeding was for the purpose of compelling the defendant to perform an official duty, and not one in which it had any personal rights to be affected."

⁶⁴⁷ *Ferrea v. Tubbs*, 125 Cal. 691, 58 Pac. 308, also cited by respondent, has no application here. The question there was as to the effect of a tender pending the appeal. There was no motion to dismiss the appeal, which was taken by the plaintiff from a judgment in his favor. If he had accepted the amount of the judgment it would, as there said, have been an end of the litigation.

The motion is denied.

APPEAL AFTER SATISFACTION OF JUDGMENT.—A JUDGMENT DEFENDANT does not waive the right to appeal and to reverse the judgment for error, by paying the amount thereof, either before or after taking his appeal, no matter whether the payment is made voluntarily or after execution has issued and been served upon him. The payment of a judgment must be regarded as compulsory, and therefore as not releasing errors nor depriving the payor of his right to appeal: See the monographic note to *State v. Conkling*, 45 Am. St. Rep. 272, 273, discussing the subject.

ESTATE OF FREUD.

[131 Cal. 667, 63 Pac. 1080.]

EXECUTORS AND ADMINISTRATORS—SALE OF PROPERTY MAY BE ORDERED, WHEN.—A court is authorized to order a sale of a decedent's property when it is necessary "to pay the debts, expenses, or charges of administration," and this refers not only to accrued debts, expenses, or charges, but to those to accrue. Hence, a sale may be ordered when necessary to meet such prospective charges or expenses, though there are no debts or expenses of administration accrued and unpaid.

EXECUTORS AND ADMINISTRATORS—POWER TO PRESERVE PROPERTY—PAYMENT OF LIENS.—An executor or administrator may do whatever is necessary for the preservation of the property of the estate, subject to the contingency of the expense being disallowed by the court, and the specific character of the act done is altogether immaterial. He has power, therefore, to preserve the property by paying off liens existing on it, when necessary for the purpose.

EXECUTORS AND ADMINISTRATORS—POWER TO REDEEM MORTGAGED PROPERTY.—An executor or administrator has power to use money in his hands for the purpose of redeeming property of the estate from a mortgage lien existing on it, and a court is authorized to order a sale for the purpose of redeeming the mortgaged premises from the lien, as it may justly regard the amount necessary for that purpose as a legitimate prospective charge or expense of administration.

EXECUTORS AND ADMINISTRATORS—REDEMPTION BY DEVISEE, AND REDEMPTION AFTER SALE.—When a debt was contracted by a decedent in his lifetime, and a mortgage given on his property, which mortgage is foreclosed and the property sold during the course of administration on the estate, a redemption by the successor in interest of one of the devisees simply terminates the effect of the sale, thus restoring the property to the estate, but reviving the lien of the mortgage for the benefit of the party redeeming, who acquires no title but an equitable lien only, by subrogation to the lien of the mortgagee. Hence, in a subsequent proceeding by an administratrix to make redemption and to charge the expense to the estate, it is still the lien of the original mortgage from which redemption is to be made.

EXECUTORS AND ADMINISTRATORS—SETTLEMENT OF ACCOUNT—CUTTING DOWN FAMILY ALLOWANCE.—In settling the account of an administratrix, the question whether a credit made to her as widow for family allowance should be further cut down by reason of her delay in closing the estate is a question for the lower court to determine, and its decision thereon will not be disturbed if no sufficient reason appears therefor.

EXECUTORS AND ADMINISTRATORS—MORTGAGE TO PAY OFF LIENS MAY BE ORDERED, WHEN.—A superior court has clear authority to order a mortgage for the purpose of paying off liens on the real property of a decedent's estate, and will not, in making such order, consider the interest of one who claims the land adversely to the estate.

Hart H. North, Henry E. Monroe, and W. B. Treadwell, for the appellant.

W. S. Goodfellow and William B. Bosley, for the respondent.

THE COURT. Appeals from an order of sale of real estate, an order settling annual account of administratrix, and an order for mortgage of real property. The several appeals will be considered in the order stated.

The deceased died seised of two lots of land, described in the petition, which he devised to his widow, Tiny Freud (now administratrix), "to hold the same during her lifetime in trust for (testator's) five children" (named in the will, and) "upon the death of (the) wife to be divided among (his) said children, share and share alike." The will was admitted to probate and letters testamentary issued to Jacob Freud, the executor therein named, March 19, 1883. An order for a family allowance to the widow of two hundred and fifty dollars a month was made December 29, 1883. The executor's final account, showing a balance of two thousand and seventy-eight dollars and sixty-two cents in his favor, was settled May 25, 1888; and thereupon he was discharged, and Mrs. Freud, the widow of deceased, was appointed administratrix with the will annexed. The estate coming into her hands consisted of the two lots above referred to, found to be of the present value, respectively, of six thousand five hundred dollars and eighteen thousand five hundred dollars.

The latter lot was subject to a mortgage of the testator to the German Savings and Loan Society for twelve thousand five hundred dollars, and, when the petition was filed, had been sold, May 31, 1898, to the bank under a foreclosure decree for eleven thousand one hundred and forty-three dollars and forty-six cents. From this sale appellant, the Warner Brothers Company, had redeemed, November 30, 1898, as successor in interest of Jacob Freud, the former executor, and one of the devisees under a deed of date October 1, 1897—the redemption money being eleven thousand six hundred and nine dollars and forty-four cents; and, in a suit brought by him against the administratrix of the estate, and the devisees other than Jacob, a decree of strict foreclosure had been rendered June 16, 1899, foreclosing their interests and that of each of them in the property sold, unless redemption should be made within sixty days from the date of the decree. The mortgage, it will be ob-

served, had not been presented to the executor as a claim against the estate.

The petition for the sale of real estate was filed June 7, 1899. Up to this time, as appears from the petition and the findings the administratrix had received in rents the sum of thirty-seven thousand five hundred and eighty-two dollars and eighty-five cents, all of which had been disbursed in payment of interest on the mortgage, taxes, repairs, and other expenses of administration, except one hundred dollars per month, which had been applied by her on her family allowance. The balance due ⁶⁷⁰ to Jacob Freud, the former administrator, two thousand and seventy-eight dollars and sixty-two cents, remained unpaid. The estimated amount of the expenses and charges of administration to accrue was two thousand dollars. The order of sale was based by the court on the double necessity of redeeming the mortgaged premises from the appellant's lien, and of paying "debts, expenses and charges of administration accruing and to accrue."

With regard to the former ground, the contention is that the court was not authorized to order a sale for the purpose of redeeming the mortgaged premises from the appellant's lien. Such authority, it is said, could be derived only from the amendment of 1893 to section 1536 of the Code of Civil Procedure, which authorizes a sale "for the advantage, benefit, and best interests of the estate and those interested in it." But under the decision in *Estate of Packer*, 125 Cal. 396, 73 Am. St. Rep. 58, 58 Pac. 59, this provision cannot apply to the estate of the decedent, who died in 1883; and hence if the order is to be justified at all, it must be justified under the provisions of the original section, or rather of the section as amended in 1880. The contention thus far, we think, must be admitted; and it may also be admitted, for the purposes of this case—as is contended—that the money needed for redemption did not come within the description of "debts outstanding against the decedent," the payment of which is one of the objects for which a sale may be made under the provisions of the statute. But a sale is also authorized when it is necessary "to pay the debts, expenses, or charges of administration"; and this refers not only to accrued debts, expenses, or charges, but to those to accrue: Code Civ. Proc., secs. 1536, 1537. Hence a sale may be ordered when necessary to meet such prospective charges or expenses, though there be "no debts or expenses of administration accrued and unpaid": *Richardson v. Butler*, 82 Cal. 179,

16 Am. St. Rep. 101, 23 Pac. 9. It is clear, therefore, that if among the powers of the administratrix was the power to make the redemption and to charge the expense to the estate, then the court was justified in regarding the amount necessary for the purpose as a legitimate prospective charge or expense of administration, and in ordering a sale for the purpose of redeeming. ⁶⁷¹ The question then reduces itself to this, Has an executor or administrator the power to use the money in his hands for the purpose of redeeming property of the estate from liens existing on it?

The question is an important one, but seems sufficiently clear. The executor or administrator is intrusted by the law with the property of others (Code Civ. Proc., secs. 1452, 1581); and the duty and corresponding power of preserving the estate results necessarily from his character as trustee: 2 Perry on Trusts, sec. 915. Thus, while generally he has no power to carry on the business of the decedent (Estate of Rose, 80 Cal. 166, 22 Pac. 86), yet he may do so if necessary to preserve the property: Estate of Smith, 118 Cal. 466, 50 Pac. 701. He may also spend money in litigation either to recover or protect property of the estate, or for insurance. So though, generally, he may not expend money in the erection of a new building (Estate of Moore, 72 Cal. 342, 13 Pac. 880), yet he may expend it in repairs to any extent necessary to preserve the property; and in cases that may be readily imagined the power to repair might extend even to the erection of a new building (Abbott's Law Dictionary, "Repair")—as, e. g., in the case of a necessary outhouse destroyed by fire or of land paying a large rental on which the building had been destroyed by fire, or decayed so as to be no longer available, and where the new building could be paid for in a very short time out of the rental. In fine, the governing principle is that—subject to the contingency of the expense being disallowed by the court—he may do whatever is necessary for the preservation of the property of the estate, and the specific character of the act done is altogether immaterial. Hence, necessarily his power must extend to the preservation of property by paying off liens existing on it, when necessary for the purpose (Woerner on Administration, sec. 329, pp. 690, 691; Burnett v. Lyford, 93 Cal. 118, 119, 28 Pac. 855)—as, e. g., in the case of taxes, tax sales, etc. (People v. Olvera, 43 Cal. 494; Weinreich v. Hensley, 121 Cal. 657, 45 Pac. 254), or as in case of cattle or horses impounded and held for expense of pasture: Estate of Armstrong,

125 Cal. 605, 58 Pac. 183. And that this is the intention of the law appears very plainly from the provisions of sections 1577, 1578, where provision is made for the payment by the administrator of liens or mortgages on the realty of the estate.

⁶⁷² Of the cases cited to the contrary by the appellant—Estate of Knight, 12 Cal. 200, 207, 73 Am. Dec. 531; Tompkins v. Weeks, 26 Cal. 50, 60—the latter has no application; the decision there resting on the ground—italicized by the court—that “*the prior mortgage of Tomes (the lien paid) was not a charge against the estate, (and that) no part of it could ever have been paid out of the estate.*” The case, therefore, need not be further considered.

Nor is the decision in Estate of Knight, 12 Cal. 200, 207, 73 Am. Dec. 531, applicable here. In that case it was said—as is doubtless true—that, while it is the duty of the administrator to preserve the estate, “this does not mean that he is, at discretion, to pay off all encumbrances resting on the property upon the notion that the property may increase in value, and thereby a speculation may be made by the estate,” and the point directly ruled was that “he cannot advance money to remove encumbrances, unless his intestate was bound to pay the money.” Thus, apparently, the decision is placed on two grounds, namely: 1. On the ground expressed, which is in effect that the administrator cannot pay all encumbrances at discretion for speculative purposes, or, it might have been said, for any purpose except for the preservation of the property, and where necessary for that purpose; and 2. On the ground that he cannot pay off encumbrances “unless his intestate was bound to pay the money.” Nor can it be determined which of these was the governing consideration in the mind of the court. But the power of the administrator to pay off encumbrances in any case results solely from the necessity of preserving the property, and can be justified only on the ground that the lien is a charge on the estate, and therefore a peril to it; and this is equally true whether the lien was created by the intestate, or, as in the case of taxes, in some other way. The circumstance that the lien was not created by the deceased may therefore be disregarded, and the decision may be construed with reference to the case before the court, and the expressed grounds of the decision. Thus construed, it may be regarded as holding simply that the administrator was not justified, under the circumstances of the particular case, in redeeming from a lien which his intestate was not bound to pay.

⁶⁷³ If, however, the decision be construed as based on the latter circumstances, it does not apply to this case, where the fact is different. Here the mortgage was made and a debt contracted by the deceased. Nor was the debt barred by failure to present it. Suit could still be maintained on it (Code Civ. Proc., sec. 1500), and it differed from other debts of the estate only in the extent to which it was a lien. Nor was the case materially altered by the sale and redemption. The effect of this, in the legal aspect of the case, was simply to terminate "the effect of the sale," thus restoring the property to the estate, but reviving the lien of the mortgage for the benefit of the party redeeming: Code Civ. Proc., sec. 703. The appellant acquired no title, but an equitable lien only, by subrogation to the lien of the mortgagee: Pomcroy's Equity Jurisprudence, secs. 798, 799, 1211, 1212. It is, therefore, still the lien of the original mortgage from which redemption is to be made.

In another respect, also, is the case of *Estate of Knight*, 12 Cal. 200, 207, 73 Am. Dec. 531, distinguishable from the case at bar. In that decision it was observed by the court, with reference to the case before it, that in such cases, where redemption was necessary, resort could be had to a court of equity. But under the existing law, where in the course of any regular proceeding the relief becomes appropriate, the resort may be now had to the court in which the administration is pending: *Toland v. Earl*, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914. It follows that in cases where the administrator is otherwise without power to redeem, authority may be given him by the court, as has been in effect done in this case by the order of sale. His authority, therefore, can now no longer be disputed; and hence the court had authority to order the sale for the purpose of obtaining the means for redemption.

It is also objected, on the supposed authority of the decision in *Estate of Crosby*, 55 Cal. 574, that the right to have a sale of the real property has been lost by laches. But that was a proceeding for the purpose of paying an allowed claim, and the case was regarded as in effect a suit by a creditor against the heirs. Here the proceeding is for the payment of expenses and charges of administration accrued and to accrue, which is a different case. It is unnecessary to consider here the question of ⁶⁷⁴ the family allowance. That was not passed on by the court, nor have we any reason to suppose that, in making the order of sale, it entered into its consideration.

With regard to the settlement of the administratrix's account, the question as to the balance of the family allowance claimed by the widow was expressly reserved from the decision by the court, and, therefore, need not be considered. The sole question is as to the item of one hundred dollars per month credited to the widow on account of family allowance. This was equivalent to a little over six years' full allowance, a period that covers less than the first two years of her administration; so that, if we leave out of view the delay of payment, the widow has received her full allowance for that period, and no more. Whether her allowance should have been further cut down by reason of her delay in closing the estate was a question for the lower court to determine, and we see no reason to disturb its decision.

With regard to the order for mortgage little need be said. The authority of the court to order a mortgage for the purpose of paying liens on the realty of the estate is expressly given by the provisions of the statute (Code Civ. Proc., sec. 1578), and the constitutionality of the act has been affirmed by this court in the case of *Murphy v. Farmers' etc. Bank*, 131 Cal. 115, 63 Pac. 368. As to the propriety of the order there can be no doubt. The authority given to the administratrix extends only to the mortgage of the property covered by the lien, which will be lost unless redeemed. No one, therefore, so far as his interest in the estate is concerned, can be injured or aggrieved by the order. The appellant is indeed interested adversely to the estate as a claimant of the land, but in this capacity he has no standing in court, and his grievance, if any, in failing to acquire the property of the estate cannot be considered.

The orders appealed from are affirmed.

Hearing in Bank denied.

DEBTS OF A DECEDENT ARE TO BE PAID from his personal estate, unless that be exhausted, whereupon the real estate may be applied for that purpose, under an order of the court obtained upon a showing of the facts: *Russell v. Russell*, 36 N. Y. 581, 98 Am. Dec. 540.

CASES
IN THE
SUPREME COURT
OF
DELAWARE.

LIEBERMAN v. FIRST NATIONAL BANK.

[2 Pennewill, 416, 45 Atl. 901.]

OFFICERS—LIABILITY OF SURETY—DEFENSE OF FALSE REPRESENTATIONS.—Unauthorized statements made by the cashier of a bank for the purpose of inducing a person to become a surety on the bond of its teller does not bind the bank nor relieve the surety from liability.

OFFICERS—BONDS—LIABILITY OF SURETY—FALSE REPRESENTATIONS AS A DEFENSE.—The published reports of a bank, though false, purporting to show its resources and liabilities, and relied upon by a person who becomes a surety on the official bond of the teller of such bank, do not bind the bank, nor relieve the surety from liability for the defalcations of such teller, when such reports have no relation to such suretyship, and do not disclose whether such teller is honest or dishonest.

OFFICERS—SURETIES—CONCEALED FRAUD OF PRINCIPALS—STATUTE OF LIMITATIONS.—In actions on official bonds, concealed fraud on the part of the principal deprives both principal and surety of the benefit of the statute of limitations. Such statute does not begin to run until the fraud is discovered.

B. Nields, for the appellant.

L. C. Vandergrift and H. H. Ward, for the respondent.

417 **LORE, C. J.** Nathan Lieberman, the appellant, one of the sureties on two official bonds of Peter T. E. Smith, late paying teller of the First National Bank of Wilmington, has appealed in this case from the decree of the chancellor, made December 3, 1898, which dissolved a preliminary injunction granted by the late Chancellor Wolcott, November 6, 1893, restraining the bank from collecting the amount of certain defal-

cations of Smith, made by him while acting as teller of the said bank.

The bonds bore date, respectively, November 1, 1879, and July 6, 1885. Each bond was in the penal sum of \$15,000, and set forth that said Smith had been duly elected and chosen teller of the bank during the pleasure of the board of directors, and each was conditioned for the faithful discharge of the duties of his office as teller of the said bank. Annexed to each bond was a joint and several warrant of attorney to enter judgment thereon. During the life of the first bond, between November 1, 1879, and July 6, 1885, Smith fraudulently abstracted funds of the bank to the amount of \$11,650. During the life of the second bond, between July 6, 1885, and July 5, 1891, he so abstracted \$27,750. These defalcations were fraudulently concealed by false entries made by Smith on the books of the bank. The defalcations were discovered about February 18, 1893, and a full confession was made by Smith.

Upon the twenty-fourth day of February, 1893, judgment was entered in the superior court of the state of Delaware on each of said bonds. Said judgments being No. 299 to February term, 1893, on the bond of November 1, 1879, and No. 301 to the said term on bond of July 6, 1885. On the latter judgment, ⁴¹⁸ execution was issued October 19, 1893, and thereunder the goods and chattels of Lieberman were taken in execution, and were about to be advertised and sold, when further proceedings were restrained by the preliminary injunction of November 6, 1893.

The chief assignments of error relied on and urged in the brief and argument in behalf of the appellant were: 1. That the bonds were void as to Lieberman, because he was induced to become surety thereon by fraudulent representations of the respondent; 2. That at the time of the entry of the judgments action on the bonds was barred by the statute of limitations.

1. The appellant contends that, under the evidence in this case, there is clear proof that, immediately before complainant became surety on the bond of November 1, 1879, he had a conversation with George D. Armstrong, cashier of said bank; that Armstrong then told him that he would run no risk in becoming surety for Smith, as he was "a good, reliable, honest man, and his accounts are all straight, and as paying teller he cannot take anything"; and that he had read the published statements of the bank showing its then resources and liabilities. That immediately before complainant became surety on the bond of

July 6, 1885, he had a further conversation with George D. Armstrong, cashier of the bank; that Armstrong then told him that Smith's books and everything were straight, and that "there was no risk whatever in going on his bond again," and that he had read the statements of the bank giving its then resources.

Complainant avers that he was induced to become surety for Smith because of such statements made to him by the cashier, and by the published reports of the bank, showing its resources and liabilities immediately before he became surety. That these reports were made and published pursuant to an act of Congress, and the cashier who made oath thereto, and the directors who certified ⁴¹⁹ to the correctness thereof, did so under the authority conferred upon them, and in discharge of a duty imposed upon them by law. That from the facts thus proved, the bonds signed by the complainant are void as to him, because he became surety thereon by reason of such fraudulent representations of the respondent.

It nowhere appears in the testimony that Armstrong, the cashier, was authorized by the bank in any way to make representations in this matter of surety on Smith's bonds, or that it was in the line of his duty as cashier to do so. Any statements made by him to Lieberman, as to Smith's honesty, the condition of his books and accounts and the probable risk to his surety, could, therefore, in no wise bind the bank. Lieberman took them at his own risk as the individual judgment of Armstrong.

The supreme court of Kentucky, in *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50, held that published reports of the assets and liabilities of a national bank, under the acts of Congress, which were false, but which, under the proof, induced a person to become surety on the official bond of the cashier of the bank, made the bond void as to such surety, and relieved him from liability thereon.

The contrary doctrine is maintained in *Ashuelot Sav. Bank v. Albee*, 63 N. H. 152, 56 Am. Rep. 501, where, after reviewing the *Graves* case, the court says: "Such report was not due to persons considering the question of becoming sureties of the treasurer. It was a duty imposed by statute for the benefit of depositors and not to enable a reader of the public reports to determine whether the treasurer was a man whose official bond he could safely sign."

This reason applies with equal force to the case now before us. It is difficult to perceive upon what principle of law or equity such published reports of the bank can be held as an inducement to Lieberman to become surety on Smith's bond. They were not made by the bank for that purpose. Their publication from time to time had no relation to such suretyship; nor did they disclose upon their face whether Smith was honest or dishonest. If Lieberman ⁴²⁰ saw fit to draw from such reports the conclusion that he could safely become surety on Smith's official bond, it was unquestionably his own volition and without participation of the bank, and for which the bank should not be held responsible.

There seems to be, therefore, nothing, either in the statements of the cashier, Armstrong, or in the published reports of the bank, that would relieve Lieberman of his liability as surety on the bonds.

2. The main and most important question in this case is raised by the statute of limitations.

The statute relating to bonds of this character is as follows: "No action shall be brought upon any bond given to the president, directors, and company of any bank, or to any corporation, by any officer of such bank or corporation, with condition for his good behavior or for the faithful discharge of the duties of his station or touching the execution of his office, against either principal or sureties, after the expiration of two years from the accruing of the cause of such action; and no action shall be brought, and no proceeding shall be had upon any such bond or upon any judgment thereon, against either principal or sureties, for any cause of action accruing after the expiration of six years from the date of such bond."

No question in this case arises under the last clause of the law, as the evidence shows that all the defalcations occurred within six years from the date of the bond under which they are claimed in each case. We have, therefore, only to deal with the two years' limitation in the first clause.

Judgment was entered February 24, 1893. Three items of defalcation under the bond of July 6, 1885, viz., April 11, 1891, \$500, July 2, 1891, \$500, July 3, 1891, \$1,500, amounting to \$2,500, are within the two years, and would not ⁴²¹ be affected by the statute in any event. The residue of the defalcations are without the two years.

Does the statute of limitations bar recovery as claimed by the appellant?

It was shown in the evidence that Smith had fraudulently abstracted \$4,600 of bank funds at the date of the first bond, November 1, 1879; that under that bond he so abstracted \$11,650, and under the bond of July 6, 1885, \$27,750. That all of these peculations were fraudulently concealed, by entries and alterations so skillfully made by him on the books of the bank, as to escape detection until he made disclosure of the same about February 18, 1893; that during all that time he was a capable and trusted officer of the bank, enjoying the confidence of his employers and of the community. The respondent contends that the bar of the statute is removed by the concealed fraud of Smith.

The question whether the fraudulent concealment of the existence of the cause of action will hinder the operation of the statute of limitations is one which has been much discussed and upon which there has been a radical difference of opinion. On one side it is said the statute, in plain terms, fixes the time when action shall be brought after the cause of action accrues; that the cause of action accrues when the act is done and the fraud is consummated; and from that time, and not from the time the plaintiff discovered it, the statute interposes as a protection; that while courts of equity may make an exception in cases of fraud, because they are not strictly bound by the statute, yet for courts of law to do the same is to except from the law cases which are plainly within its terms.

On the other side, it is said, the statute must be expounded reasonably, so as to suppress and not to extend the mischief it was intended to cure; that it was intended to suppress fraud by preventing unjust claims from starting up, after a great lapse of time, ⁴²² when evidence by which they might be repelled was forgotten or had ceased to exist; that it should not, therefore, be so construed as to encourage fraud by enabling those who, through falsehood or deceit, have managed to keep one in ignorance of the fact that he had a cause of action, to take advantage of their own wrongdoing under a plea of the statute.

"We think," says the court, in *Reynolds v. Hennesy*, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639, "the latter position is best sustained by reason and authority. It certainly is in the line of justice and morality. The only objection to it is that it introduces an exception into the statute." The same objection lies to claims in favor of the government and to cases of new promise. The statute does not take away the debt, but simply

affects the remedy. Hence, if one by fraud conceals the fact of a right of action, it is not ingrafting an exception on the statute to say that he is not protected thereby, but it is simply saying that he never was within the statute, since its protection was never designed for such as he. By fraud he has put himself outside of its pale. Whether this be taken as an exception or only a limitation of the statute, it rests upon sound reason and just policy: *Reynolds v. Hennesy*, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639; *Bree v. Holbeck*, 2 Doug. 655; *South Sea Co. v. Wymensdell*, 3 P. Wms. 143.

Such a construction has been so frequently applied to the statute that it is now said to have the weight of authority in its favor. Massachusetts, Maine, New Hampshire, Pennsylvania, Illinois, Indiana, and Texas are among the states supporting this view; while the contrary has been held in New York, Virginia, North Carolina, South Carolina, and New Jersey.

In *First Massachusetts Turnpike Co. v. Field*, 3 Mass. 201, 8 Am. Dec. 124, Chief Justice Parsons uses this language: "That where the delay in bringing the suit is owing to the fraud of the defendant, the cause of action ought not to be considered as having accrued until the plaintiff could obtain ⁴²³ knowledge that he had a cause of action; and if this knowledge was concealed from him by the defendant fraudulently the court would violate a sacred rule of law if they permitted the defendant to avail himself of his own fraud."

The reason given by Lord Redesdale, in *Hovenden v. Lord Annesly*, 2 Schoales & L. 634, why the statute should not operate as a bar, where fraud has been concealed by one party until it has been discovered by the other, is "that the statute ought not in conscience to run; the conscience of the party being so affected that he ought not to avail himself of the length of time."

Whatever may be the conflict in courts of law upon this point, it is, without controversy, the settled doctrine in courts of equity: *Angell on Limitations*, sec. 183; *Coster v. Murray*, 5 Johns. Ch. 522.

But it is insisted that while this rule prevails against the person who committed the fraud, that a different rule exists in favor of innocent sureties, who had no knowledge of, and did not participate in, such fraud. That while Smith, who fraudulently concealed his peculations, would not be suffered to shield himself behind the statute, that Lieberman, his surety, who is

innocent of fraud, has a right to set up the statute as his protection. In cases like this, is there any such distinction between the liability of principal and surety?

In *Charles v. Haskins*, 14 Iowa, 473, 83 Am. Dec. 378, which was an action against sheriff's sureties for wrongful seizure of goods under an execution, the court says: "The governing principle is, that the liability of the surety is dependent upon that of the principal."

In *Zent v. Heart*, 8 Pa. St. 337, which was an action against a surety on a promissory note barred by the statute, where the principal had paid interest within six years, Chief Justice Gibson held that: "The decisions at length have settled that the payment of one is the acknowledgment of both whenever it has been made during their joint responsibility; in other words, before it has been severed by the death of one of them."

⁴²⁴ In *Boehmer v. County of Schuylkill*, 46 Pa. St. 452, which was an action against sureties on a county treasurer's bond, where the defense was that the county commissioners had exceeded their power in borrowing the money which came into the treasurer's hands, that the money so received was not within the bond, the court, Chief Justice Woodward, says: "In so far as the principal is liable by the mere force and terms of the bond, the surety is bound with him."

In *Patterson's Appeal*, 48 Pa. St. 342, the sureties of an absconding assignee who was trustee for the benefit of creditors were held not entitled to credit on account, which their principal could not claim by reason of fraud. Story, Justice, says: "The sureties stand in no better position than their principal. The measure of his responsibility is the measure of theirs."

In *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 94, which was an action against the sureties of a justice of the peace for money collected and fraudulently concealed until the statute had run, the court says: "The statute in this case is pleaded by the sureties, and they have not been guilty of any fraud; but they, without doubt, we think, are bound by the fraudulent conduct of their principal. The liability of the surety is dependent upon the liability of the principal. The ordinary rule is that if the principal is bound, so is the surety."

This point has been directly adjudged in this state. In *Sparks v. Farmers' Bank*, 3 Del. Ch. 275, a case against the sureties of a defaulting cashier of the bank, the precise question was determined. The chancellor there held that the bank was entitled to collect of the sureties so much of the defalca-

tions as occurred more than two years previous to the entering of the judgment on the bond, for the reason that "their equity to do so arises out of the fact that the defalcation was a fraud, concealed from the bank, with respect to which a court of equity will not permit the statutory bar to be set up until the lapse of the prescribed term after the discovery of the fraud."

⁴²⁵ This case was argued by some of the ablest lawyers of the state. While it is true that the distinction between the liability of surety and principal in cases like this where there is concealed fraud does not seem to have been raised and dwelt upon by counsel for the sureties, still it is only fair to assume that the failure to do so did not arise from any lack of knowledge or research, but rather from lack of material for, and confidence in, such a defense.

The case of *Grimshaw v. Mayor etc.*, 5 Del. Ch. 183, which was against the sureties of a defaulting treasurer of the city of Wilmington, has been urged as countervailing this doctrine. The chancellor in his opinion expressly excepts cases like the present out of his consideration, in the following language: "I shall not enter into a general discussion of the principle applicable to a case where a concealed fraud has been proved to exist on the part of the defendant in a suit brought against him after the discovery of the fraud has been made, but not within the period mentioned in the statute in that respect, to make him account for the amount of said fraud, because I am of the opinion that the principles adjudged in cases of that kind, where the statutory limitation has been pleaded as a bar to the cause of action, are not applicable to the case before me. It is true that where one person defrauds another of his just rights, and the fraud is concealed at the time of its commission and not discovered within the period embraced by the statute of limitations, the party defrauded has a right to bring his action for the recovery of the amount of which he has been defrauded, at any time within the proper legal period for bringing actions."

The cases of *Hudson v. Bishop*, 32 Fed. 519, *United States v. Marks*, 3 Wall. Jr. 358, Fed. Cas. No. 11,990, and of *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376, relied upon by counsel for the appellant, do not seem to modify this principle relating to sureties.

It therefore seems to be established that in cases on official bonds, concealed fraud on the part of the principal will deprive ⁴²⁶ both principal and surety of the benefit of the stat-

ute of limitations; that the statute does not begin to run until the fraud is discovered.

The reason seems to be, that in such bonds the sureties guarantee the good conduct and faithfulness of the principal in the discharge of the duties of his office, and that in equity and good conscience they should not be exempt from liability for his misconduct and peculations, when by fraudulent concealment he has prevented discovery until the time limited by the statute to bring action has expired. Any other construction would make the very frauds against which the sureties covenanted the means of relief from liability. The bond in such case, instead of securing the faithfulness of the officer, would tend to promote on his part skillfully and fraudulently concealed peculations, and would be an inducement to fraud.

If concealed fraud, which the principal undertakes not to perpetrate, deprives such principal of the protection of the statute, is it not equally reasonable that the undertaking of the surety that such fraud should not be perpetrated should exclude the surety also? The principal undertakes not to commit fraud; the surety guarantees that he shall not commit fraud. There would seem to be no substantial reason why their respective liabilities for such fraud should be different.

It may seem hard that by reason of the fraud of a principal the liability of an innocent surety should be continued for many years after the expiration of the time named in the statute of limitations. The hardship would be greater if another equally innocent person should be made to suffer by such fraud, in cases where the surety undertakes that the principal shall be faithful and honest in that very matter. The equities being equal as to innocence, the added burden of his obligation rests upon the surety.

"It is true that equity will not relieve against the bar of the statute, in favor of the party who has been in laches in not using means within his power to discover the fraud": *Sparks v. Farmers' Bank*, 3 Del. Ch. 302.

⁴²⁷ It must be remembered that in these bonds Lieberman undertook for the fidelity of Smith absolutely, and at all events, and engaged unconditionally to make good his defaults. True it is he contracted in view of the statute of limitations. It is equally true that he contracted in view of the law contained in adjudged cases in this state controlling the application of the statute.

The rule is that: "It is good faith and not diligence which is required of the creditor as a condition of his right to hold the surety; but the creditor or obligee in a bond is not obliged, for the benefit of sureties, to watch the principal. It is because it is really impracticable for this to be done effectively and at all times, on the part of large corporations, that official bonds are required. To subject the responsibility of such sureties to so indefinite a question as whether due diligence has been exercised by directors would render these securities worthless: *Sparks v. Farmers' Bank*, 3 Del. Ch. 302.

Judge Thompson, in *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 349, thus defines the diligence required in the officers of a bank: "I know of no positive duty resting on the officers of the bank to investigate with a view to inform a surety in the absence of any inquiry or request of him to do so. Had such a request been made, and it had been denied or evaded, a different question might have been presented. Neither the bank nor its officers knew or had reason to suspect, so far as we can learn, the defalcation afterward discovered."

Chief Justice Shaw tersely says, in *Amherst Bank v. Root*, 2 Met. 540, that "negligence of directors and their agents is no excuse."

In a case cited by the appellants, *Graves v. Lebanon Nat. Bank*, 10 Bush, 28, 19 Am. Rep. 50, the measure of diligence is thus defined: "The directors may have been negligent in the discharge of their duties, and this negligence may have enabled Mitchell for the time to misappropriate the funds of the bank, and to conceal its true condition by the false reports made to the controller of the currency and by ⁴²⁸ false entries upon the books of the association, but this negligence cannot avail the sureties who covenanted that their principal should well and truly perform the duties of his position. Their covenant is unconditional, and no failure of duty on the part of the directors of the association, short of actual fraud or bad faith, can be deemed sufficient to exonerate them from its performance."

The testimony in this case discloses no such laches as would discharge the surety. It shows that Smith was generally esteemed as an honest and capable officer. That the usual examinations of the condition of the bank from time to time were had, both by the officers of the bank and by a government examiner; that no suspicion of the defalcations of Smith existed in the mind of anyone at any time prior to February,

1893; that Lieberman made no request for an examination of Smith's accounts; that the defalcations were therefore concealed by Smith, who was a skilled accountant. There is no claim that the bank did not exercise good faith toward the surety at all times.

A careful examination of this case discloses no ground for the relief of the surety. The decree of the chancellor in that respect is therefore affirmed. Inasmuch, however, as it appears from the entire record that certain errors have been inadvertently incorporated into the decree of the chancellor, in respect to the date of the first bond, the duration of the defalcation under the second bond, and the allowance of interest on the penal sum of each bond, it is the judgment of this court that said surety is liable for the defalcations of said Smith, with interest from the date of these defalcations to the third day of December, 1898, the date of the decree of the chancellor in this case; provided, the aggregate sum of the principal and interest ascertained to said date on each bond shall not exceed the penalty thereof. And the said surety is also further liable for interest on such aggregate sum, so ascertained, from the said third day of December, 1898, the date of said decree.

And now, to wit, this the nineteenth day of January, 1900, it ⁴²⁰ appearing to the court that on the third day of December, 1898, it was ascertained by the decree of the chancellor in this state that there was due on each of the said bonds a sum in excess of fifteen thousand dollars, the penalty thereof, now, therefore, it is ordered, adjudged, and decreed that the said, the First National Bank of Wilmington, the respondent, have liberty to collect on each of its judgments entered on each of the said bonds in the superior court of the state of Delaware, in and for New Castle county, against Nathan Lieberman, the appellant, the sum of fifteen thousand dollars, with interest thereon from the third day of December, 1898, the date of the said decree and the date of the authoritative and legal ascertainment of the amount due on each of said bonds. And it is further ordered that the appellant pay the costs in this case within three months of attachment.

THE HOLDING OF THE PRINCIPAL CASE as to the first point of the syllabus is supported by *Savings Bank v. Albee*, 63 N. H. 152, 56 Am. Rep. 501. A contrary doctrine, however, is laid down in *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50.

TULLY v. PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD COMPANY.

[2 Pennewill, 537, 47 Atl. 1019.]

NEGLIGENCE—WHEN QUESTION FOR COURT.—If there is no evidence of negligence on the part of the defendant, or no evidence from which the jury can reasonably infer such negligence, it is the duty of the court to withhold the case from its consideration. A verdict for the plaintiff, under such circumstances, must be set aside.

NEGLIGENCE—WHEN QUESTION FOR JURY.—It is the province of the jury to determine doubtful questions of negligence; and if the evidence, or the reasonable inference that the jury may draw therefrom, is sufficient to support a verdict for the plaintiff, the case should be submitted to the jury.

NEGLIGENCE IS FAILURE TO OBSERVE, for the protection of the interests of another, that degree of care, precaution, and vigilance which the circumstances demand, whereby such other person suffers injury. Negligence is a failure to exercise such reasonable care as should be exercised by a person of ordinary prudence under similar circumstances.

NEGLIGENCE — CONTRIBUTORY — TRESPASSERS. — A trespasser may recover for injury resulting from the gross negligence or carelessness of the defendant. The mere fact that plaintiff, at the time he suffered the injury complained of, was a trespasser, and would not have been injured if he had not trespassed, is not conclusive evidence of contributory negligence.

NEGLIGENCE—CONTRIBUTORY—CHILDREN.—In the application of the doctrine of contributory negligence to children, the rule governing adults is greatly modified. A child is held to the exercise of such a degree of care and discretion only as is reasonably to be expected from children of his age. The care to be required of a child is to be ascertained by his maturity, discretion, and capacity, and the particular circumstances of the case, and the determination of such question should generally be submitted to the jury.

NEGLIGENCE—CONTRIBUTORY, WHEN DOES NOT BAR RECOVERY.—Plaintiff may recover for an injury caused by defendant's negligence, notwithstanding plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of plaintiff's danger, to use ordinary care to avoid injury to him.

NEGLIGENCE—CHILDREN—TRESPASSERS.—If the jury find from the evidence that defendant's servant in charge of shifting cars saw a young boy who was injured in a place of danger on one of such cars, and failed to make any effort to prevent him from exposing himself to such danger, and that the signaling brakeman on the car attached to or pushed by the shifting engine saw, or from his position should have seen, the boy in a place of danger on one of the cars he was approaching in time to avoid the danger, or give warning of it, and that he made no effort to avoid the danger or warn the boy, it is justified in finding the defendant guilty of such negligence as would render him liable.

NEGLIGENCE — CHILDREN — TRESPASSERS.—If it is shown that a young boy injured by shifting cars was actually seen in a place of danger by the servants of the defendant in time to avoid his injury, it is immaterial whether he and other boys were or were not accustomed to be upon the empty cars of the defendant.

J. Marvel, for the appellant.

H. H. Ward and A. O. Gray, for the respondent.

538 SPRUANCE, J. This action was brought by the administrator of Henry Tully, deceased, for the recovery of damages for the death of the said Henry Tully, alleged to have been occasioned by the negligence of the defendant.

The material facts as shown by the record are as follows: An engine and train crew of the defendant had shifted a box-car, coal-car, and stone-car from the main track of the defendant's road, in the city of Wilmington, to a sidetrack, known as the corn track, leaving the end of the stone-car projecting over the main track. Immediately thereafter the said Henry Tully, aged about eight years, and two other small boys climbed into said coal-car, which was empty, for the purpose of picking up refuse coal. Henry Tully went first into the gates at the bottom of the car, and quickly returning went to the end of the car toward the main track, and put one leg over the side of the car, apparently for the purpose of getting off of the car. At this time the engine was on the main **539** track pushing a box-car, upon the top of which was a brakeman giving signals to the engineer. Just then some one called out, "You can't pass; come back again." The brakeman gave the signal to back, the engine came back, and the box-car pushed by the engine struck the end of the stone-car projecting over upon the main track with such force as to drive forward eight or nine feet the three cars upon the corn track, and throw Henry Tully from the coal-car. The car wheels passed over him and he was instantly killed.

A person in the employ of the defendant, described as "the head brakeman or conductor, who ruled everything around there, . . . the man who bossed them all," passed within three feet of Henry Tully as he was getting into the coal-car, and looked at him, but said nothing. Before and at the time of the accident the brakeman on the top of the box-car pushed by the engine was looking down upon the boys in the coal-car, and saw them, or could have seen them. The sides of the coal-car came only up to about the waist of Henry Tully. While

the boys were on the coal-car no warning was given by bell, whistle, or otherwise.

Upon the close of the testimony for the plaintiff the defendant moved for a nonsuit upon the grounds: 1. That the testimony failed to show that the defendant was guilty of negligence; and 2. That the testimony showed that the plaintiff's intestate was guilty of contributory negligence.

The court ordered a nonsuit, but the plaintiff having declined to take the same, the court instructed the jury to return a verdict for the defendant. The plaintiff excepted and his eighth assignment of error is as to this instruction of the court.

If there was no evidence of negligence on the part of the defendant, or no evidence from which the jury could reasonably infer such negligence, it was the duty of the court to withhold the case from their consideration, as a verdict for the plaintiff, under such circumstances, would have been set aside: *Creswell v. Wilmington etc. R. R. Co.*, 2 Penne. (Del.) 210, 43 Atl. 629.

⁵⁴⁰ But it should not be forgotten that it is the province of the jury to determine doubtful questions of fact, and that where the evidence or the reasonable inferences that the jury might draw from it would be sufficient to support a verdict for the plaintiff, the case should be submitted to the jury.

Considering the evidence as to the circumstances under which Henry Tully and his companions were upon the property of the defendant most unfavorably to the plaintiff, and regarding the boys as simple trespassers, was there any sufficient evidence of negligence on the part of the defendant, or any evidence from which the jury could have reasonably inferred such negligence?

"Negligence, in a legal sense, is no more or less than this: the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury": *Cooley on Torts*, 630.

While the obligation to exercise care in the conduct of one's business varies under different circumstances, there always remains the duty to exercise such reasonable care as should be exercised by a person of ordinary prudence under like circumstances.

In *Cummins v. Presley*, 4 Harr. (Del.) 315, it was held that the master of the defendant's vessel was without excuse for running against a vessel, out of her proper place and in a position of danger in a navigable stream, if by the exercise of or-

dinary skill, care, and diligence he could have avoided the collision, and that in such case the defendant would be liable. It is universally conceded that a trespasser may recover for injuries resulting from the gross negligence or carelessness of the defendant: *Weldon v. Philadelphia etc. R. R. Co.*, 2 Penne. (Del.) 1, 43 Atl. 156.

The mere fact that a plaintiff, when he suffered the injury complained of, was a trespasser on the defendant's premises, and would not have been injured if he had not so trespassed, is not conclusive evidence of contributory negligence: 1 *Shearman and Redfield on Negligence*, sec. 97.

⁵⁴¹ While the decisions upon this point have been conflicting, there are many approved cases in which trespassers have recovered damages for personal injuries, and this is especially so in cases of children: 1 *Shearman and Redfield on Negligence*, sec. 98. In the application of the doctrine of contributory negligence to children the rule governing adults is greatly modified. A child is held only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age. The care required of a child is to be ascertained by his maturity and capacity, and the particular circumstances of the case and the determination of the question should generally be submitted to the jury: 1 *Shearman and Redfield on Negligence*, sec. 73; *Weldon v. Philadelphia etc. R. R. Co.*, 2 Penne. (Del.) 1, 43 Atl. 156; *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 281, 14 Sup. Ct. Rep. 619.

"It is now perfectly settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed": *Shearman and Redfield on Negligence*, sec. 99.

This doctrine was fully discussed and adopted by the house of lords in *Radley v. London etc. Ry. Co.*, L. R. 1 App. Cas. 754, and by the supreme court of the United States in *Inland etc. Coasting Co. v. Tolson*, 139 U. S. 558, 559, 11 Sup. Ct. Rep. 653.

It is obvious that the empty coal-car from which Henry Tully was thrown was, under the circumstances, from the time he got upon it a place of great danger to a boy of his age. If the case

had gone to the jury, and they had found from the evidence that the defendant's servant in charge of the business of ⁵⁴² shifting cars there going on saw Henry Tully, a boy of eight years old, in a place of danger on one of the said cars, and failed to make any effort to prevent him from exposing himself to such danger, or any effort to avert such danger, and that the signaling brakeman on the car attached to or pushed by the shifting engine saw, or from his position should have seen, the boy in a place of danger on one of the cars he was approaching, in time to avoid the danger or give warning of it, and that he made no effort to avoid the danger or warn the boy, the jury would have been justified in finding the defendant guilty of such negligence as would render it liable in this action.

We are of the opinion that the question as to negligence of the defendant, and the question as to the contributory negligence of the plaintiff's intestate, should, under proper instructions by the court, have been submitted to the determination of the jury, and that the court erred in directing the jury to render a verdict for the defendant.

The other assignments of error relate to the refusal of the court to admit certain testimony. The seventh assignment was abandoned by the plaintiff. The fourth and fifth relate to the refusal to admit testimony as to the customary public use of the tracks and right of way of the defendant at or near the place of the accident, for the purpose of passage between Buena Vista and Market streets. As the plaintiff's intestate was not killed while so using the property of the defendant, the rulings of the court in this respect were clearly correct. The remaining four assignments of error relate to the refusal to receive testimony tending to show a custom or habit of boys to be upon empty cars on the defendant's tracks, with the consent or knowledge of the employes of the defendant.

Our conclusion as to the charge to the jury, and the evidence that Henry Tully was seen by the servants of the defendant upon the car from which he was thrown, render a critical examination of these assignments unnecessary.

⁵⁴³ If the question was whether the servants of the defendant exercised due diligence in the discovery of the presence of boys upon empty cars, the inquiry whether boys were accustomed to be there might be important, but where it appears that the person killed was actually seen in the place of danger by the servants of the defendant in time to avoid his injury or death, it is quite immaterial whether he and other boys were

or were not accustomed to be upon the empty cars of the defendant.

The judgment below is reversed.

NEGLIGENCE IS THE FAILURE to exercise such care, prudence, and forethought as duty, under the circumstances, requires: *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563, 58 Am. St. Rep. 709, 67 N. W. 470. It is the absence of such care as persons of ordinary prudence are expected to exercise under like circumstances: *Lillibridge v. McCann*, 117 Mich. 84, 72 Am. St. Rep. 553, 73 N. W. 288.

CONTRIBUTORY NEGLIGENCE ON THE PART OF A MINOR is to be measured by his age and ability to discern and apprehend danger. He is required to exercise only such prudence as one of his age may be expected to possess: *Queen v. Dayton Coal etc. Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935, 32 S. W. 460; and not such as an adult would be called upon to use in the same circumstances: *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 14 Pac. 42. But though a minor is guilty of contributory negligence, this does not relieve those dealing with him from exercising reasonable care: See the monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 412; *Alabama etc. R. R. Co. v. Burgess*, 119 Ala. 535, 72 Am. St. Rep. 943, 25 South. 251.

RAILROADS — NEGLIGENCE — INFANTS.—If the proximate cause of an infant's death is the negligence of the railway company in failing to keep a reasonable lookout and to discover the child in time to prevent an injury, it is as much liable as if the proximate cause of the injury were its negligence after discovering the child on the track: *Mason v. Southern Ry. Co.*, 58 S. C. 70, 79 Am. St. Rep. 826, 36 S. E. 440.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MADDOX v. MADDOX.

[189 Ill. 152, 59 N. E. 599.]

MARRIAGE AND DIVORCE.—CRUELTY, to constitute a ground for divorce, must consist of acts of physical violence.

MARRIAGE AND DIVORCE—CRUELTY.—Denial of ordinary comforts and accommodations and want of civil attentions are not sufficient cruelty to constitute a ground for divorce.

W. C. Johns, for the appellant.

Redmon & Hogan, for the appellee.

152 WILKIN, J. This is a writ of error to the appellate court for the third district, seeking to reverse a judgment of that court affirming a decree of the circuit court of Macon county sustaining a demurrer to the bill of complaint of Rose Maddox. The prayer of her bill was for a divorce, on the ground of extreme and repeated cruelty. It is alleged that the parties were married in November, 1887; that they lived together until January 7, 1897; that defendant was an able-bodied, vigorous man, able to earn support for himself and his family; that, regardless of his marriage vows, he was guilty of extreme, repeated, and continuous cruelty to complainant, in that he failed to provide for her and her children a suitable place in which to live, but provided one wholly unfit for human habitation, notwithstanding other places were accessible, **153** whereby she and her children were exposed to severe winter weather and suffered from extreme cold, and in that he failed to provide her and her children with sufficient clothing to protect them from the cold, whereby they suffered exposure of their persons, and also in that

he negligently failed to provide her and her children with sufficient food and nourishment; that on the seventh day of January, 1897, being a bitter cold day, she was compelled to and did abandon the uninhabitable place in which she had been compelled to live, etc. In other words, the charge throughout is that defendant cruelly and heartlessly neglected complainant, failing to provide her with suitable shelter, clothing and food.

The question to be determined here is, Do the facts, as alleged, under the decisions of this court, constitute "extreme and repeated cruelty," within the meaning of section 1 of chapter 40 of the Revised Statutes, entitled "Divorce"? The section provides: "That in every case in which a marriage has been, or hereafter may be, contracted and solemnized between any two persons, and it shall be adjudged, in the manner hereinafter provided, that either party has been guilty of extreme and repeated cruelty, it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract."

The question as to what constitutes cruelty, as contemplated by our statute, has been repeatedly considered and decided by this court, and while each case must necessarily be adjudged by itself, in view of its own peculiar facts and circumstances, yet it has been uniformly held that cruelty, as a ground for the granting of a divorce, must consist of acts of physical violence. As was said in *Harman v. Harman*, 16 Ill. 85, 90: "There must be acts or threats which may raise a reasonable apprehension of bodily hurt. The causes must be grave and weighty, and show a state of personal danger incompatible with the duties of married life. It is not mere ¹⁵⁴ austerities of temper, petulance of manners, rudeness of language, a want of civil attentions, occasional sallies of passion, denials of little indulgences and particular accommodations, and which do not threaten bodily harm. These are not legal cruelty": See the case of *Fizette v. Fizette*, 146 Ill. 328, 34 N. E. 799, where the foregoing language is quoted with approval and numerous other cases to the same effect are cited. The facts alleged in this bill show a want of civil attention and a denial of ordinary comforts and accommodations, but these, under the foregoing decisions, are not sufficient to constitute cruelty, such as is contemplated by the statute as a ground for divorce.

However strongly the allegations of this bill and the arguments of counsel may appeal to the sympathy of the court, it is too clear for argument that unless we shall overrule the uniform line of decisions cited above, the judgment of the appellate court

must be confirmed. The right to a divorce in this state is regulated by statute, and can only be decreed by the courts for some one of the causes therein enumerated. It does not follow that because the wife may be unable to bring herself within the requirements of the law so as to obtain a legal separation from a husband, she must therefore suffer from his neglect and continue to reside with him, but she may, if not herself in fault, live separate and apart from him, compelling him to provide her with the necessities and comforts of life, according to his ability to do so. The persuasive argument of counsel for the plaintiff in error might with propriety be made before the legislature in support of enactments to meet a case like one here presented, though we express no opinion on that subject; but it is not for the court to add to the statute by way of judicial legislation.

We think the decree of the circuit court and the judgment of the appellate court are in harmony with the long-established rule in this state, and they will be affirmed.

DIVORCE.—CRUELTY, AS A CAUSE FOR DIVORCE, is not confined to acts of personal violence, but includes such treatment as endangers health and renders cohabitation intolerable: *Gardner v. Gardner*, 104 Tenn. 410, 78 Am. St. Rep. 924, 58 S. W. 342. Yet it has often been held that mere rudeness of manners or language, petulance, austerity of temper, or occasional sallies of temper do not constitute legal cruelty: See the monographic note to *Reinhard v. Reinhard*, 65 Am. St. Rep. 78. Failure of a wife to stay at home and care for her sick husband, he being financially able to procure proper attendance, has been held not to be a ground for divorce: *Bonney v. Bonney*, 175 Mass. 7, 78 Am. St. Rep. 473, 55 N. E. 461.

GUNNING v. PEOPLE.

[189 Ill. 165, 59 N. E. 494.]

CRIMINAL LAW — INDICTMENT — TOWN ASSESSOR — BRIBES.—An indictment against a town assessor for offering to receive a bribe to reduce an assessment is insufficient unless it appears therefrom that the property assessed is situated in the town for which the accused was acting in his official capacity.

EVIDENCE — JUDICIAL NOTICE—BOUNDARIES.—Courts take judicial notice of the political divisions of the state into counties, towns, and cities, and that a county is under township organization, and that a particular township is in a certain county, and of the relative location of such towns with respect to one another.

EVIDENCE — JUDICIAL NOTICE—BOUNDARIES.—Courts take judicial notice of the boundaries of towns when they have been fixed by law; but they cannot take judicial notice of the precise

location of a city lot in a subdivision or resubdivision of urban lands, with respect to city, township, or other political divisional lines, without the aid of a public statute.

PLEADING—NECESSARY FACTS.—It is not permissible, in either civil or criminal pleading, to leave a fact necessary to be averred to be inferred from an allegation of a mere conclusion of law.

E. H. Morris, for the appellant.

E. C. Akin, attorney general, C. S. Deneen, state's attorney, and W. M. McEwen, for the people.

¹⁶⁵ **CARTER, J.** Richard C. Gunning, the plaintiff in error, was indicted and convicted of corruptly proposing to receive a bribe to influence his official action as assessor of the ¹⁶⁶ town of South Chicago by reducing the assessment which had been made for purposes of taxation on a certain lot in Chicago, and was adjudged to pay a fine of three thousand five hundred dollars, under sections 31 and 32 of the Criminal Code. The appellate court having affirmed the judgment, Gunning sued out this writ of error to bring the record before this court for review.

The indictment consisted of thirty counts, all charging the same offense, varying in manner of stating particular facts, but none of them alleged that the real estate upon which the assessment was sought to be reduced was situated in the town of South Chicago, of which town Gunning was assessor. The court overruled the motion of the defendant below to quash the indictment, and although it was proved on the trial that the lot in question was in the town of South Chicago, such proof would not, of course, cure such a defect in the indictment, if defect it was, for proofs without allegations are as ineffectual as allegations without proofs.

The evidence upon the issue of guilt or innocence was conflicting and irreconcilable, but the most serious question presented to us is upon the assignment of error that the court erred in refusing to quash the indictment. A case involving such an offense is of grave importance to the public and demands careful consideration, and such a consideration we have endeavored to give it.

The charge in each of the counts was, in substance, that said Richard C. Gunning was the duly elected and qualified assessor of said town of South Chicago, and while acting as such officer, on, to wit, etc., unlawfully and corruptly did propose to receive a bribe to influence his official action as such assessor, in this:

That he, said Gunning, then and there proposed to one Charles Fellows that upon the payment then and there by him, said Fellows, to him, said Gunning, of the sum of one thousand dollars, he, the said Gunning, would reduce the assessed valuation, to wit, one hundred thousand dollars, for the taxes of the year 1897, upon the ¹⁶⁷ following described real estate, to wit: Lot 1 of the assessor's resubdivision of sublots 1 to 5, in block 58, of the original town of Chicago, together with the building thereon, commonly known as the "Reliance Building," and the improvements thereon, all in said county of Cook, in the state of Illinois, to the assessed valuation, to wit, ninety-one thousand nine hundred and seventy dollars, which had been made on said property for the taxes of the year 1896.

It needs hardly to be stated that Gunning had, as assessor of the town of South Chicago, no power or official authority to reduce the assessment on real estate situated outside of said town. Unless, therefore, the lot in question was situated in said town he was wholly without official authority to make the reduction he is charged with having offered to make for the alleged bribe. It follows, of course, that it must appear from the indictment before it can be sustained that said lot was situated in said town, for to the assessment of property therein Gunning's official duty was confined. Thus, in *Van Dusen v. People*, 78 Ill. 645, it was held that an assessor, not being authorized to assess property outside of his township, cannot lawfully administer outside of such township an oath to a person concerning his rights and credits liable to assessment, and a conviction of perjury was reversed because the evidence failed to show that the affidavit was sworn to in the township before the assessor where he had the power to administer the oath. We need not, however, dwell on this branch of the question, for there is no controversy, and could be none, between counsel respecting it.

But it is contended, for the people, that from what is alleged the court will take judicial notice that the said property is situated in the town of South Chicago. If this contention be correct, then no further allegation on that subject was necessary, for matters of which the court must take notice need be neither alleged nor proved. The question is, Can the courts of the jurisdiction take ¹⁶⁸ judicial notice that the property, as above described, is situated in the town of South Chicago? A mere statement of the question would seem to imply a negative answer, if established rules of law governing the subject are to be re-

garded. But counsel say, and the court will take notice, that the original town of Chicago was incorporated by an act of the legislature in 1835, and that it included "all that district of country in sections 9 and 16, north and south fractional section 10 and fractional section 15, in township 39 north, range 14 east of the third principal meridian" (Laws 1835, p. 204), and that the town of South Chicago now includes in its limits a part of the original town of Chicago. But even if the courts could notice which of the sections of land, or parts thereof, were included in these several towns, how could the court say, from its judicial knowledge, which of them includes the subdivision which contains the lot in question? From the description given, the lot may as well be supposed, by all except those having special information on the subject, to be in the west or the north town as in the south town. Courts will take judicial cognizance, without allegation or proof, of the political division of the state into counties, towns, and cities, that a county is under township organization and that a particular township is in a certain county, and of the relative location of such towns with respect to each other: See 1 Greenleaf on Evidence, sec. 6. And the author also says: "In fine, a court will generally take notice of whatever ought to be generally known within the limits of its jurisdiction": See, also, 1 Phillips on Evidence, 625; 12 Am. & Eng. Ency. of Law, 151; an exhaustive note to *Lanfear v. Mestier*, 89 Am. Dec. 679; *Dickenson v. Breeden*, 30 Ill. 279; *People v. Suppiger*, 103 Ill. 434; *Wilcox v. Jackson*, 109 Ill. 261. They will also take notice of the boundaries of towns when they have been fixed by law, and counsel for plaintiff in error in this case concedes that the court could take judicial cognizance of the boundaries ¹⁶⁹ of the several towns in Cook county, but insists, and it seems to us correctly, that knowing such boundaries would not fix the location of the lot in question with reference to such boundaries. In *Breedy v. Page*, 59 Cal. 52, it was held by a divided court that the courts of that jurisdiction would take notice of the streets of San Francisco and their relation to each other and the direction in which they run. But that decision was based on a statute of that state. This court has held that it could not judicially know that certain streets mentioned in the record were in the city of Chicago: *Dougherty v. People*, 118 Ill. 160, 8 N. E. 673; *Moore v. People*, 150 Ill. 405, 37 N. E. 909. And in *Cicotte v. Anciaux*, 53 Mich. 227, 18 N. W. 793, it was held that the supreme court of that state

had no judicial knowledge of the contents of plats of Detroit or of Detroit lands, except as affected by legislation or other public action. We know of no law of this state identifying or fixing the location of block 58, or its subdivisions, in the original town of Chicago, by which we or the court below could determine its situs as respects the boundaries of the three towns by which the said original town is divided. Nor would it be a safe precedent to establish, to declare that its location with reference to the boundaries of the south town, or the building commonly called the "Reliance Building," had become so universally or generally known as to have become a matter of public knowledge, to be accepted without proof in all cases where it might be collaterally involved. In *Brown v. Piper*, 91 U. S. 42, it was said: "This power is to be exercised with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

But it is urged that the question has been in effect decided by this court, and the appellate court seems to have so concluded. In *Gardner v. Eberhart*, 82 Ill. 316, where a debtor occupied four contiguous town lots all in one inclosure, numbered 12, 13, 14, and 15, a tenant occupying ¹⁷⁰ a house on 12 and a shop being on 14, the question arose whether the debtor was entitled to all of the lots in the one inclosure as his homestead exemption. In deciding the case the court used this language (page 321): "The court will take notice of the subdivision of town and city property into blocks and lots, as well as the legal subdivision by government surveys of land in the country, and where several forty acre tracts lie contiguous, or where several village or city lots lie contiguous, and where a debtor has a dwelling on any given forty acre tract which, with the buildings thereon, is of the value of more than one thousand dollars, or where a debtor has a dwelling on any given town or city lot which, with the buildings thereon, clearly exceeds in value one thousand dollars—in such case the law regards the forty acres, or village or city lot on which the debtor's residence is situated, as the 'lot of ground by him occupied as a residence.'" Similar language was used in *Sever v. Lyons*, 170 Ill. 395, 48 N. E. 926, in deciding the question of homestead; but, obviously, the court did not decide or intend to decide that the court would take judicial notice of plats of subdivisions of urban lands, or of the subdivisions themselves, with reference to questions of the location of the different lots and blocks, but only that such lands were, as a rule,

subdivided into blocks and lots, thus enabling the court, by making use of a matter of common knowledge, to know and apply the proper meaning intended by the legislature by the clause, "lot of ground occupied by him as a residence," in the homestead act.

But it is unnecessary to pursue this subject further. While it is doubtless true that matters of which courts will take judicial notice have broadened in their scope as public information has increased, we know of no rule or precedent, and have been referred to no authority, which would sustain a decision that a court would take judicial notice of the precise location of a mere city lot in a subdivision or resubdivision of urban lands, with ¹⁷¹ respect to township or other political divisional lines, without the aid of a public statute.

The point is also made, that from the allegation that Gunning offered to receive the alleged bribe to influence his official action as assessor in reducing the assessment on the said lot it is properly deducible that, as his official action was confined to the assessment of property in the town of South Chicago, the lot must have been situated in that town. It is not permissible, in pleading, to leave a fact necessary to be averred to be derived by inference from an allegation of a mere conclusion of law. All necessary facts should be pleaded with reasonable certainty, and section 6 of division 11 of the Criminal Code has not dispensed with that rule: *Prichard v. People*, 149 Ill. 50, 36 N. E. 103; *McNair v. People*, 89 Ill. 441; 1 *Bishop on Criminal Procedure*, sec. 627; *Thompson v. People*, 96 Ill. 158. In *People v. Davis*, 112 Ill. 272 (an action of debt to recover delinquent taxes), it was held, on demurrer, that a declaration was insufficient in law which failed to state the facts from which the liability, as a conclusion of law, resulted; that the averment that the property was taxable at the place in which it was assessed was the statement of a conclusion of law, and was bad on demurrer. But in the case at bar there is not even an allegation as specific as that. It is not even averred that Gunning, as assessor, had the power or authority to assess the property in question or to reduce the assessment upon it. It is plain the indictment should have been quashed.

The judgments of the appellate court and the criminal court are reversed, and the cause is remanded to the criminal court of Cook county for further proceedings not inconsistent with this opinion.

Mr. Justice Magruder, dissenting.

Judicial Notice of Localities and Boundaries.

Courts take judicial notice of the prominent geographical features of the country: *Bell v. Barnet*, 2 J. J. Marsh. 531; *State v. Wabash Paper Co.*, 21 Ind. App. 176, 51 N. E. 949; *Foscur v. Lyon*, 55 Ala. 440; *Mossman v. Forrest*, 27 Ind. 233; *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 136; *Bittle v. Stuart*, 34 Ark. 224; such notice must be taken of the geographical position of the divisions of the state: *Harvey v. Wayne*, 72 Me. 430. Courts, ex officio, take notice of the civic divisions of the state created by public laws and of its great geographical features, as its large lakes, rivers, and mountains: *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

The history of a country, its topography and condition, enter into the construction of the laws which are made to govern it, and must be noticed judicially: *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 136. Courts must take judicial notice of the geography of the country, and of the mode of subdividing congressional townships into sections: *Mossman v. Forrest*, 27 Ind. 233. Such notice will be taken that the province of Upper Canada is a foreign country; that it forms no part of the United States; that it has a government and courts of its own; and that the latter proceed according to the course of the common law: *Lazler v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Ex parte Lane*, 6 Fed. 34; *Calhoun v. Ross*, 60 Ill. App. 309.

The courts of another state take judicial notice of the fact that the island of Rock Island is within the state of Illinois, and forms a part of its territory for judicial and all other purposes: *Gilbert v. Moline Water Power etc. Co.*, 19 Iowa, 319.

In construing and ascertaining the location and boundaries of an ancient French grant of lands, the names of all the places and natural objects mentioned except "Toul" river being now unknown, the court takes judicial notice of the general geography of the country about the mouth of such river, and also of the historical fact that "Dauphin" island was anciently known as "Massacre" island: *Trenier v. Stewart*, 55 Ala. 458. Judicial notice cannot, it is said, be taken that a particular locality is or is not within a particular county: *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575. It is difficult to understand what the court meant by the use of this language. Its opinion does not show whether the localities referred to were towns, villages, lands designated on government surveys, or mere farms, or neighborhoods described by local titles. The language is ambiguous, and, if taken in its ordinary signification, unsound. Certainly, it is not reconcilable with many of the authorities hereinafter cited. Such notice is taken that on a certain date the region of country known as "Pike's Peak" was within the territory of Kansas: *Carey v. Reeves*, 46 Kan. 571, 26 Pac. 951. Judicial notice is taken of the fact that lands sought to be acquired under the pre-emption laws of the United States are within the cor-

porate limits of a city, and not subject to pre-emption: *Houlton v. Chicago etc. Ry. Co.*, 86 Wis. 59, 56 N. W. 338. Such notice is taken that the meadows and lowlands of East Tennessee are all overflowed by occasional freshets: *Kerns v. Perry* (Tenn.), 48 S. W. 729; and that lands in certain parts of the state are used for grazing purposes alone: *Buford v. Houtz*, 5 Utah, 591, 18 Pac. 633. Courts take judicial notice of the disturbed condition of the country during the Civil War in determining the good faith and diligence of a trustee in making investments of trust funds during that period: *Foscue v. Lyon*, 55 Ala. 440. And they also take such notice of the session of a portion of the territory of a state to exclusive foreign jurisdiction, and that crimes committed in the ceded territory are beyond the jurisdiction of the state courts: *Lasher v. State*, 30 Tex. App. 887, 28 Am. St. Rep. 922, 17 S. W. 1064. Also that the District of Columbia and the city of Washington, situated therein, are within the exclusive jurisdiction of the United States: *In re Price*, 83 Fed. 830-832; *United States v. Price*, 84 Fed. 636.

Courts are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from public statutes, although the latter are not actually put in evidence: *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. Rep. 80; *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575.

In the following cases the courts have refused to take judicial notice of certain matters; as whether the conditions as to climate, soil, topography, and rainfall are the same in one county as in another: *Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197; or that the land in question in an action of ejectment is part of the pueblo lands which were confirmed to the city of San Francisco by a decree of the circuit court of the United States: *Goodwin v. Scheerer*, 106 Cal. 600, 40 Pac. 18; or as to the nature and extent of tide lands or mud flats in a certain locality: *Baer v. Moran*, 153 U. S. 257, 14 Sup. Ct. Rep. 823. Whether or not a particular tract or grant of land lies within the boundary line of the twenty border leagues cannot be judicially known to the court: *Edwards v. Davis*, 3 Tex. 321. Nor the fact that a certain county in the state is in an arid region: *McGhee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, 22 S. W. 396. Or that a certain tract of land is arid: *Slatterly v. Harley*, 58 Neb. 575, 79 N. W. 151. A court cannot take judicial notice of the limits of a place which is not a public corporation, and which is described only by its name: *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720.

Government Surveys.—Courts take judicial notice of government surveys and the legal subdivision of lands and of their location: *Bittle v. Stuart*, 34 Ark. 224; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81; *O'Brien v. Krockinski*, 50 Ill. App. 456; *Smitha v. Flournoy*, 47 Ala. 345; *Money v. Turnipseed*, 50 Ala. 499;

Webb v. Mullins, 78 Ala. 111. Judicial notice must be taken of the general system of government surveys of lands, and hence that there is, and can be, but one tract of land within the state to which the description in question is applicable: **Quinn v. Champagne**, 38 Minn. 322, 37 N. W. 451; **State v. Gramelspacher**, 126 Ind. 398, 26 N. E. 81; **Smith v. Green**, 41 Fed. 455; **Carson v. Railsback**, 3 Wash. Ter. 169, 13 Pac. 618. Courts of a state take judicial notice of the fact that a particular legal subdivision of land is not fractional: **Peck v. Sims**, 120 Ind. 345, 22 N. E. 313. If land is described as "Sec. 23, 38, 14," the court has judicial knowledge that such description means "section 23, township 38, range 14": **McChesney v. Chicago**, 173 Ill. 75, 50 N. E. 191; also that a certain township and range described in a certain county is a fractional township, in which the sixteenth section contains less than three hundred and twenty acres: **Knabe v. Burden**, 88 Ala. 436, 7 South. 92; and that a quarter section of land described is made up of four forty acre tracts, each with well-defined boundaries: **Hill v. Bacon**, 43 Ill. 477; also that the south line of a particular section coincides with the south line of the township: **Kille v. Yellowhead**, 80 Ill. 208. If land in litigation is located with reference to government surveys, judicial notice is taken of the county in which the land is situated: **Dickerson v. Hendry**, 88 Ill. 66. A description of land as in "town. 22" is judicially noticed as being in "township 22 north": **Dawson v. James**, 64 Ind. 162.

Courts will take judicial notice of the county in which land is situated when it is described by section, township, and range: **Brown v. Ogg**, 85 Ind. 234; **Bannister v. Grassy Fork etc. Co.**, 52 Ind. 178; **Smith v. Clifford**, 90 Ind. 113. Courts will also take judicial notice of the county in which a public highway is located, if the lands to be affected by it are described by governmental survey subdivisions: **Adams v. Harrington**, 114 Ind. 66, 14 N. E. 603; and that land described by the government survey description is in a certain township: **Dexter v. Cranston**, 41 Mich. 448, 2 N. W. 674; and that a certain township is in a certain county: **Cornshock v. People**, 56 Ill. App. 468; and of the location of a certain range as "range 5": **Muse v. Richards**, 70 Miss. 581, 12 South. 821. Judicial notice cannot be taken of the fact that land described in a mortgage by reference to a private and not a government survey, and as situated in a certain county, has, since the execution of the mortgage, been taken from that county and attached to the county in which the foreclosure suit is brought: **Campbell v. West**, 86 Cal. 197, 24 Pac. 1000. Nor can courts take judicial notice of the fact whether lands located under scrip in a lake, which is a navigable body of water, are or are not subject to location: **Wilcox v. Jackson**, 109 Ill. 261.

Railroads.—As courts take judicial notice of the leading geographical features of the country, and as the locality of important lines of railroad, once established, become as fixed and permanent and as well known as any other geographical feature of the country, the

court must take judicial notice that two important railroads are parallel and competing lines: *Gulf etc. R. R. Co. v. State*, 72 Tex. 404, 13 Am. St. Rep. 815, 10 S. W. 81. And the court has judicial knowledge that a railroad company incorporated in one state has lines extending into another: *Hobbs v. Memphis etc. R. R. Co.*, 9 Helsk. 873. The fact that different lines of railroad run into a certain city is a matter of judicial knowledge: *Texas etc. R. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118. Courts will take judicial notice of the county in which a given station on a specified railroad is located: *Louisville etc. Ry. Co. v. McAfee*, 15 Ind. App. 442, 43 N. E. 86; or of a township through which a certain line of railroad will run: *Reading v. Wedder*, 66 Ill. 81; and that a grade crossing on a line of railroad is a place of danger: *Chicago etc. R. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624.

Counties and County Seats.—Courts take notice of the division of the state into counties, and of the name and location of each of such counties: *Holley v. Holley*, Litt. Sel. Cas. 505, 12 Am. Dec. 342; *Bittle v. Stuart*, 34 Ark. 224; *Camp v. Marion Co.*, 91 Ala. 240, 8 South. 786; *Trammell v. Chambers Co.*, 93 Ala. 388, 9 South. 815; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049; *State v. Powers*, 25 Conn. 48; *Ex parte Carr*, 22 Neb. 535, 35 N. W. 409; *Gooding v. Morgan*, 70 Ill. 275; *Harvey v. Wayne*, 72 Me. 430; *Beasley v. Beckley*, 28 W. Va. 81; *Adams v. State*, 35 Tex. Cr. Rep. 285, 33 S. W. 354; *Hall v. Rushing*, 21 Tex. Civ. App. 631, 54 S. W. 30; *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106.

Courts will take judicial notice of the time of the organization of the counties in the state and of their location: *Pitts v. Lewis*, 81 Iowa, 51, 46 N. W. 739; *Ellsworth v. Nelson*, 81 Iowa, 57, 46 N. W. 740. Whether or not a new county has been created and exists at the time of a criminal trial is a matter of judicial notice, if the act for the organization of the county declares that it shall be and become an organized county from and after the day upon which the returns of an election in favor of creating it, shall be ascertained and declared: *People v. Wallace*, 101 Cal. 281, 35 Pac. 862. The court will take judicial notice that premises described in a mortgage by section, range, and township are in fact in a new county carved out of an old county: *Faekler v. Wright*, 86 Cal. 210, 24 Pac. 906; and that a township named in the evidence is in the county named in the indictment: *Commonwealth v. Kaiser*, 184 Pa. St. 493, 39 Atl. 299. And that a certain county is embraced in a certain judicial district: *Barnwell v. Marion*, 58 S. C. 459, 36 S. E. 818. But the court cannot take judicial notice that a particular part of a public road is situated in a certain county: *Waters v. State*, 117 Ala. 189, 23 South. 28.

Courts take judicial notice that a particular town is the county seat of a certain county: *Adair v. England*, 58 Iowa, 314, 12 N. W. 277; *Andrews v. Knox County*, 70 Ill. 65; *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106; *Gager v. Henry*, 5 Saw. 237, Fed. Cas. No.

5172; *Whitener v. Belknap*, 89 Tex. 273, 34 S. W. 594. Courts take judicial notice of every county seat in the state and of the location thereof: *Mode v. Beasley*, 143 Ind. 309, 42 N. E. 727; *Cole v. Segraves*, 88 Cal. 103, 25 Pac. 1109; *People v. Etting*, 99 Cal. 577, 34 Pac. 237.

Cities and Towns.—It may be stated as a general rule that courts take judicial notice of the location of important cities or towns: *King v. American Transportation Co.*, 1 Flap. 1, Fed. Cas. No. 7787; *Toppan v. Cleveland etc. R. R. Co.*, 1 Flap. 74, Fed. Cas. No. 14,099; *Dickinson v. Branch Bank*, 12 Ala. 54; *Parks v. Jacob Dold Packing Co.*, 6 Misc. Rep. 570; 27 N. Y. Supp. 289; *Whitlock v. Castro*, 22 Tex. 108. The rule is so well settled and universally adhered to that, in both civil and criminal cases the courts take judicial notice that a certain city or town named is in a particular county, though the latter is not named, that but a few of the many cases sustaining this doctrine need be cited. Among them are *Forehand v. State*, 53 Ark. 46, 13 S. W. 728; *Luck v. State*, 96 Ind. 16; *Sullivan v. People*, 122 Ill. 385, 13 N. E. 248; *Central R. R. etc. Co. v. Gamble*, 77 Ga. 584, 3 S. E. 287; *Harding v. Strong*, 42 Ill. 148, 80 Am. Dec. 415; *Green v. Paul*, 60 Neb. 7, 82 N. W. 98; *State v. Reader*, 60 Iowa, 527, 15 N. W. 423; *State v. Simpson*, 91 Me. 83, 39 Atl. 287; *People v. Curley*, 99 Mich. 238, 58 N. W. 68; *Baumann v. Granite Sav. Bank*, 66 Minn. 227, 68 N. W. 1074; *Kretzschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41; *Vanderwerker v. People*, 5 Wend. 530; *People v. Wood*, 131 N. Y. 617, 30 N. E. 243; *Marx v. Croisan*, 17 Or. 393, 21 Pac. 310; *Linck v. Litchfield*, 141 Ill. 469, 31 N. E. 123; *Solyer v. Romanet*, 52 Tex. 562; *Beasley v. Beckley*, 28 W. Va. 81; *Monford v. State*, 35 Tex. Cr. Rep. 237, 33 S. W. 551. In *Latham v. State*, 19 Tex. App. 305, and in *State v. First Nat. Bank*, 3 S. Dak. 52, 51 N. W. 780, the contrary doctrine was maintained, and it was held that the court could not judicially know that a certain town named was in a certain county mentioned. In an action in Alabama, the courts of that state will take judicial notice that the city of New York is a commercial center beyond the limits of that state: *Dickinson v. Branch Bank*, 12 Ala. 54. Courts will take notice judicially of the geographical position of towns in a county: *Indianapolis etc. R. Co. v. Stephens*, 28 Ind. 429; and in an action against a railroad company for killing stock, judicial notice is taken of the location of a city which is the place of trial: *Kansas City etc. R. R. Co. v. Burge*, 40 Kan. 736, 21 Pac. 589. Courts judicially know that a place named is one of the smaller towns of the state: *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638, 646, 37 S. W. 545; and that certain cities named are the commercial centers of the state: *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 658, 29 Am. St. Rep. 690, 19 S. W. 274. If a collection of houses are unincorporated, the court cannot take judicial notice of their location, on proof merely of the name that such collection of houses is known by: *Huston v. People*, 53 Ill. App. 501. It has been held that courts cannot judicially know that New Orleans is in the state

of Louisiana: *Riggin v. Collier*, 6 Mo. 508; *Andrews v. Hoxie*, 5 Tex. 171; nor that Philadelphia, the place where a note was dated, was not in the state of Texas: *Cook v. Crawford*, 4 Tex. 420. These decisions may, of course, be regarded as mementoes of judicial folly—witnesses of the sad truth that no measure has been found to fully represent judicial incapacity.

The court cannot take judicial notice that a railroad company in locating its road between given points will not run near certain towns from which it receives subscriptions of stock: *Phillips v. Albany*, 28 Wis. 340.

Streets, Blocks, Lots, etc.—It is reasonably well settled that courts take judicial notice of the streets of a city, their location, and relation to one another, and the direction in which they run as laid down on an official map of such city: *Brady v. Page*, 59 Cal. 52; *Williams v. Savings etc. Soc.*, 97 Cal. 122, 31 Pac. 908; *Whiting v. Quackenbush*, 54 Cal. 306; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283; *Walsh v. Missouri Pac. Ry. Co.*, 102 Mo. 589, 15 S. W. 757; *Poland v. Dreyfous*, 48 La. Ann. 83, 18 South. 906; *State v. Ruth*, 14 Mo. App. 226. Courts take notice of the streets and of the names and locations of suburbs, from time to time brought within the city limits: *Poland v. Dreyfous*, 48 La. Ann. 83, 18 South. 906; also of the relation of the streets of a city to one another, and their location and that a crossing where an improvement is located necessarily forms a part of the public street: *Williams v. Savings etc. Soc.*, 97 Cal. 122, 31 Pac. 908; provided such streets are established by statute; but such notice cannot be taken of streets established by dedication, or opened and adopted by municipal ordinance: *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283. It has been held, however, that courts cannot take judicial notice of the streets of a city, nor of their direction: *Breckinridge v. American Cent. Ing. Co.*, 87 Mo. 68. Such notice cannot be taken of the place of the intersection of a street with a railroad track: *Pennsylvania Co. v. Fraua*, 13 Ill. App. 91. And it has also been held that courts cannot judicially know the distance between various streets of a city: *North Chicago Street Ry. Co. v. Cheetham*, 58 Ill. App. 318. Judicial notice will be taken that premises described by a street are within the particular judicial district within which it is situated: *People v. Kelly*, 20 Hun, 549. Courts take judicial notice of the location and situation of streets, squares, and public grounds in a city: *Prince v. Crocker*, 166 Mass. 347-364, 44 N. E. 446. Judicial notice cannot be taken of the location of an office of a justice of the peace in a city, nor that a particular number on a given street is in a given ward of such city: *Allen v. Schaninghansen*, 8 Mo. App. 229.

Courts take judicial notice of the subdivision of town and city property into separate lots and blocks, for the purpose of determining what land is covered by a homestead exemption: *Hill v. Bacon*, 43 Ill. 477; *Gardner v. Eberhart*, 82 Ill. 316; *Sever v. Lyons*, 170

ILL. 395, 48 N. E. 926. But the court cannot take judicial notice of the relative situation of lots and blocks on a map or plat not introduced in evidence, or as to how they apply to the ground: *Shepard v. Shepard*, 36 Mich. 173. Courts judicially know that a certain township of land has no legal subdivisions known as "blocks": *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849.

Boundaries.—Courts are bound to know judicially the boundaries of the United States, at least so far as they coincide with the boundaries of the state: *Ogden v. Lund*, 11 Tex. 688. Courts are also bound to take judicial notice of the boundaries of the different states in the United States: *King v. American Transportation Co.*, 1 Flap. 1, Fed. Cas. No. 7787; *State v. Dunwell*, 3 R. I. 127; *Thorson v. Peterson*, 9 Fed. 517. The court must take judicial knowledge of the boundary of a territory, its division into judicial districts and the limits of each: *United States v. Beebe*, 2 Dak. Ter. 292, 11 N. W. 505; *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106. The court has judicial knowledge of the fact that Indian Territory is beyond the boundary and jurisdiction of the state of Texas: *Conner v. State*, 23 Tex. App. 378, 5 S. W. 189. And that the state of Missouri is east of the Rocky Mountains: *Price v. Page*, 24 Mo. 65. Courts also take judicial notice of the boundaries of the political subdivisions of the state: *State v. Snow*, 117 N. C. 774, 23 S. E. 322. Hence, they must take judicial notice of the boundaries and extent of the different counties in the state: *Biddle v. Stuart*, 34 Ark. 224; *Smitha v. Flourney*, 47 Ala. 345; *Cornshock v. People*, 56 Ill. App. 467; *Jasper Co. Commrs. v. Spitler*, 13 Ind. 235; *Indianapolis etc. R. R. Co. v. Moore*, 16 Ind. 431; *Ham v. Ham*, 39 Me. 263; *Bond v. Perkins*, 4 Helsk. 364; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81; *Evans v. Kilby*, 81 Ga. 278, 7 S. E. 226; *Kansas City etc. R. R. Co. v. Binge*, 40 Kan. 736, 21 Pac. 589; *McGill v. State*, 25 Tex. App. 499, 8 S. W. 661; *Wright v. Hawkins*, 28 Tex. 452; *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000. The court will take judicial notice that a certain distance from a place named in a certain county is within that county: *Indianapolis etc. R. R. Co. v. Lyon*, 48 Ind. 119; *Kansas City etc. R. R. Co. v. Burge*, 40 Kan. 736, 21 Pac. 589; *Louisville etc. R. R. Co. v. Hixon*, 101 Ind. 337. It has been held that a court cannot take judicial notice of township lines: *Mayer v. St. Louis etc. R. R. Co.*, 71 Mo. App. 140.

Courts take judicial notice of the boundaries of a judicial district and of the counties or territory included therein: *Chicago etc. R. R. Co. v. Hyatt*, 48 Neb. 161, 67 N. W. 8; *Commonwealth v. Fitzpatrick*, 121 Pa. St. 109, 6 Am. St. Rep. 757, 15 Atl. 466. Also of the boundaries of a city as described in the act of its incorporation: *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610; *Kansas City v. Vineyard*, 128 Mo. 75, 30 S. W. 326. Also that a river flows through such city from north to south, and near one of its boundaries: *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610. Also of the

general location boundaries and juxtaposition of towns and wards: *State v. Cunningham*, 81 Wis. 440, 51 N. W. 724.

Rivers, Lakes, etc.—Courts are bound to take judicial notice of public navigable waters, of their location and navigability: *King v. American Transportation Co.*, 1 Flap. 1, Fed. Cas. No. 7787; *Lands v. Cargo of Coal*, 4 Fed. 478; *McIntosh v. Gastenhofer*, 2 Rob. (La.) 403. Courts generally take judicial notice of the navigability of streams and rivers: *Neaderhouser v. State*, 28 Ind. 258; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655; *Bittle v. Stuart*, 34 Ark. 224. It has been held that courts are bound to know, judicially, what streams are, and what are not, navigable at common law: *Browne v. Schofield*, 8 Barb. 239. The courts of a state will take judicial notice that a certain river therein is not a navigable stream: *Clark v. Cambridge etc. Co.*, 45 Neb. 776, 64 N. W. 239; *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655; *Walker v. Allen*, 72 Ala. 456. Courts take judicial notice of the condition and location of rivers, streams, and bodies of water. Thus, they have judicial knowledge that a certain named river is above the ebb and flow of the tide, and hence *prima facie* non-navigable: *Olive v. State*, 86 Ala. 88, 5 South. 653; that the Connecticut river above the dam at Holyoke, Massachusetts, does not constitute a public highway over which commerce can be carried on among the states, and that, therefore, its waters are not within the maritime jurisdiction: *Commonwealth v. King*, 150 Mass. 221, 22 N. E. 905; that the Chicago river is situated in the midst of the city of Chicago, where a dense population exists, and near which much of the business of the city is transacted: *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698; that no part of a certain river lies within the corporate limits of a certain city: *Montgomery v. Montgomery etc. Road Co.*, 31 Ala. 76; that the natural watercourses within the state have all decreased in volume, and many of them been dried up by the cultivation and clearing of the country: *Hilliker v. Coleman*, 73 Mich. 170, 41 N. W. 219; of the location and course of a river frequently mentioned in the public statutes: *De Baker v. Southern Cal. Rty. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610; that a certain creek empties its water and that of its tributaries into a particular river at a specified point: *Canal Commrs. v. East Peoria*, 75 Ill. App. 451; of the source and mouth of a river, and that both such source and mouth are large navigable bodies of water: *People v. Truckee Lumber Co.*, 116 Cal. 397, 58 Am. St. Rep. 163, 48 Pac. 374; that certain rivers are navigable and that certain others are not, but the court cannot judicially know where the navigability of any particular river ends: *United States v. Rio Grande Irr. Co.*, 174 U. S. 690-698, 19 Sup. Ct. Rep. 770. Judicial notice may be taken of the character of the Ohio river, as to the rise and fall of the water therein during certain seasons of the year: *Thurman v. Morrison*, 14 B. Mon. 367; and the fact of the geographical position of the falls of the Ohio river, and that no

pilots are appointed for other falls within the state may be judicially noticed: *Cash v. Auditor of Clark Co.*, 7 Ind. 227. Courts take judicial cognizance of the location and existence of such a body of water as Lake St. Clair: *People v. Brooks*, 101 Mich. 98, 59 N. W. 444; and that Casco bay, computed to extend for thirty miles along the coast of Maine, contains many minor bays, harbors, and inlets wherein the taking of certain fish is prohibited: *State v. Thompson*, 85 Me. 189, 27 Atl. 97. Courts take judicial notice of the geographical features of the state, as its large lakes, rivers, and mountains: *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

Distances.—Judicial notice may be taken of the distance between well-known cities in the United States, or in the same state, or in different states: *Mutual etc. Life Ins. Co. v. Robison*, 58 Fed. 723; *Pearce v. Langfit*, 101 Pa. St. 507, 47 Am. Rep. 737; *Hegard v. California Ins. Co. (Cal.)*, 11 Pac. 594; *Blumenthal v. Pacific Meat Co.*, 12 Wash. 331, 41 Pac. 47; *Pettit v. State*, 135 Ind. 393, 412, 34 N. E. 1118; *Seigbert v. Stiles*, 89 Wis. 533. And of the ordinary speed of railroad trains or means of transportation between such places: *Pearce v. Langfit*, 101 Pa. St. 507, 47 Am. Rep. 737; *Pettit v. State*, 135 Ind. 393, 412, 34 N. E. 1118. Judicial notice is taken of the distance between county seats: *Coover v. Davenport*, 1 Heisk. 368, 2 Am. Rep. 706; and of the distance from the county seat of a certain town mentioned in the record of the court: *Bruson v. Clark*, 151 Ill. 495, 38 N. E. 252; and that the distance between the town in which absent witnesses reside and the place of trial is such that they could have been produced in court: *State v. Seery*, 95 Iowa, 652, 64 N. W. 631. But courts are not bound to take judicial notice of the local situation of private property and its distance from the county seat: *Russell v. Hoyt*, 4 Mont. 412, 2 Pac. 25; or of the distances of certain places in counties from one another: *Goodwin v. Appleton*, 22 Me. 453. And courts cannot, so it has been held, take judicial notice of the distance between the various streets of the city of Chicago: *North Chicago St. Ry. Co. v. Cheetham*, 58 Ill. App. 318. But may take judicial knowledge as to whether or not the residence of a witness as stated in his deposition is more than thirty miles from the place of trial: *Hinckley v. Beckwith*, 23 Wis. 328.

JOB v. ALTON.

[189 ILL. 256, 59 N. E. 622.]

MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENTS — SPECIAL BENEFITS — CONSTITUTIONAL LAW.— Although a statute providing for the construction of sidewalks by special taxation does not limit the amount of the tax to the amount that the property will be specially benefited, it is not obnoxious to the fourteenth amendment of the national constitution. Property owners are protected from arbitrary exactions under such statute by the rule that ordinances passed thereunder, to be valid, must be reasonable, and not oppressive or unjust.

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS —SPECIAL BENEFITS—REMEDY.— Upon proceedings for a judgment for the sale of property to pay a delinquent special tax levied under authority of a statute authorizing the construction of sidewalks by special taxation, the property owner has a right to have the questions decided whether such tax is in excess of the benefits derived, and whether the ordinance under which the tax is levied is unreasonable and oppressive.

J. G. Irwin and B. J. O'Neill, for the appellants.

L. Davis and L. D. Yager, for the appellees.

²⁵⁸ CARTER, J. Appellants, who are the owners of the lots specially taxed, filed their bill in the city court of Alton against the city of Alton, its mayor, city clerk, and special collector, to enjoin the collection of a special tax levied by the city council to construct a sidewalk. On the final hearing the court dismissed the bill, but continued in force, pending this appeal, the temporary injunction which had been previously granted.

²⁵⁹ The case made by the pleadings and proofs is, briefly, this: On August 10, 1897, the council passed an ordinance entitled "An ordinance for the construction of a brick sidewalk on Third street, from Cherry street to Shields street," in pursuance of "An act to provide additional means for the construction of sidewalks in cities, towns and villages," approved April 15, in force July 1, 1875: Laws 1875, p. 63. The grounds upon which the complainants sought to maintain their bill was, that the tax was imposed without authority of law and was and is illegal and the ordinance void. The sidewalk and curbing, the manner of construction under the direction of the city engineer and materials to be used were specifically described in the ordinance. The ordinance required, in accordance with the statute, the several lot owners to construct such walk in front of their respective lots abutting thereon within thirty days, and provided that in default thereof so much of the walk as should not be so

made should be constructed by the city and the cost apportioned to the several lots fronting thereon, according to frontage, and paid by special taxation. A few of the lot owners constructed the walk in front of their lots, but the complainants refused on their part, and the work in front of their several lots was done by the city and the cost imposed on their said lots, as provided by the ordinance. They refused to pay the same on the warrant issued by the city clerk, and when that officer was about to make report to the county collector of such special tax as delinquent, in order that a judgment of sale might be obtained, as provided by the statute and the ordinance, the complainants filed their bill and obtained the temporary injunction above mentioned.

While several minor objections to the ordinance and the tax are urged, and which we find are untenable, the substantial ground relied on to sustain the bill is, that the ordinance is void because the whole cost of the sidewalk was imposed as a special tax upon the abutting ²⁶⁰ property according to frontage, and was not limited to the amount of benefits, and no provision was made, as it is said, for ascertaining such benefits; that both the statute and ordinance violate the constitution of this state and also the fourteenth amendment to the constitution of the United States, which prohibits the state from depriving any person of his property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws, as that amendment has been construed by the supreme court of the United States in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187. The bill alleged also, and it is contended, that the ordinance is unreasonable and oppressive, and void for that reason.

It will be observed that the ordinance follows the statute of 1875, and that no provision for ascertaining benefits by a hearing in court on application to confirm the assessment is made either by the statute or the ordinance, and that the only hearing open to the property owner is the one which may be had on the application of the county collector for a judgment of sale for delinquent taxes. Counsel concede that the statute of 1875, relating to sidewalks, has been held a valid one by this court (*White v. People*, 94 Ill. 604; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143), except so much of it as makes the lot owner personally liable, but they contend that since the statute of 1895, amending section 17 of article 9 of the general incorporation act (Laws 1895, p. 100), which, in substance, has been incorporated as section 35 of the local improvement act of 1897

(Hurd's Stats. 1899, p. 362), provision must be made by law for ascertaining the special benefits and for a determination of that question by the courts before there can be any return of the property as delinquent to the county collector. Their contention amounts to this: That a special tax to build a sidewalk cannot now be levied under the act of 1875, which makes no provision for proceedings in court to confirm such ²⁶¹ tax, and for a hearing in such proceeding as to the question of benefits, without applying also the provisions of the act of 1897 providing for such a hearing. It is sufficient to say that the local improvement act of 1897 does not purport to amend the sidewalk act of 1875 nor to repeal it. Section 99 of the act of 1897 expressly preserves from repeal the act entitled "An act to provide additional means for the construction of sidewalks in cities, towns, and villages," and we held in *People v. Yancey*, 167 Ill. 255, 47 N. E. 521, that the act of 1895, amending section 17 of article 9 of the city and village act, which provided for a hearing of the question of benefits on application to the court for confirmation, did not repeal said sidewalk act of 1875. We there held that there was no method of getting the special tax levy, made under the sidewalk act of 1875, before a court for review until application is made for judgment against the delinquent lands; that the act of 1875 and the act of 1897 cannot be combined, nor can municipal authorities proceed partly under one and partly under the other in the same case; that the sidewalk act is complete in itself. It follows that it must be held that in levying the tax in question the city of Alton proceeded in conformity to the constitution and laws of this state, it not having been made to appear that the ordinance was unreasonable or oppressive.

It only remains to be considered whether said sidewalk act of 1875, and the proceedings taken under it in this case, are in conflict with the fourteenth amendment of the constitution of the United States, as that amendment has been recently construed by the federal supreme court in *Norwood v. Baker*, 173 U. S. 269, 19 Sup. Ct. Rep. 187. The substance of the holding in that case was, that an assessment of the whole cost of opening a street, including the value of the land and the costs of condemnation proceedings, could not be assessed back upon the property abutting on each side of the new street, according to the front-foot plan, without regard to the question whether or not ²⁶² the property so assessed was specially benefited to the amount of the assessment, and that such an assessment was void under

the fourteenth amendment because it rested upon a basis that excluded any consideration of benefits, and that a bill to enjoin the whole assessment was the only appropriate remedy. Among other things the court said: "The guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public; it is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

²⁶³ This decision of the supreme court of the United States was considered and applied in *Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379, in which case it was held that a statute authorizing an assessment in substantial excess of the benefits to be derived from the making of a sewer was void; that such assessment must be founded on the benefits and be proportionate to the benefit. In *Adams v. Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 57 N. E. 114, it was held applicable to the improvement of a street by setting curbstones and filling in between the curb and the lot lines, and it was there held that all local assessments in excess of the special benefits are a benefit to the municipality and must be borne by the general treasury,

but the statute in that case was held valid because a hearing before the city council was authorized by the statute where the property owner could be heard on the question of benefits. The Norwood case has also been cited and applied, or distinguished, in many other cases in both the federal and state courts. A few only need be mentioned.

In *Webster v. Fargo*, 9 N. Dak. 208, 82 N. W. 732, it was held that a statute which authorized the charging of the whole cost of paving a street on the abutting property according to frontage was not in conflict with the fourteenth amendment to the federal constitution, and that the decision in the Norwood case was based upon the particular provisions of the statutes of Ohio. The effect of the decision in the Dakota case is, that it was not the intention of the supreme court of the United States to announce the general doctrine that any legislative enactment authorizing the levy of a special assessment to pay for any kind of a local improvement upon abutting property, according to frontage, is in conflict with the fourteenth amendment, unless it provides that such assessment or tax shall be based upon, or not exceed, the special benefits which the property taxed will receive by the improvement, and unless it provides for the property owner an opportunity to be heard in some proper proceeding to determine that question. The supreme court of Michigan took a similar view in *Crass Farm Co. v. Detroit* (Mich.), 83 N. W. 108, and held that an act authorizing the assessment of the entire cost of paving a street upon the abutting property, according to frontage, was not an arbitrary exaction and in conflict with the fourteenth amendment to the federal constitution.

We might refer to other cases, but as the case at bar involves the construction of a sidewalk only, and not a general improvement of the street, we deem it unnecessary to enter upon any general review of the authorities. As to local improvements other than sidewalks constructed under said act of 1875, the question involved has been put at rest in this state by the recent legislation above mentioned, although as a federal question it has not heretofore been decided. But, in accord with the great weight of authority, including that of the supreme court of the United States as then understood, this court had held in a long line of cases that while a special tax for a local improvement is based upon the special benefits which it is presumed the property taxed will receive from the improvement, the ordinance itself, passed in pursuance of legislative authority under the con-

stitution of this state, was a conclusive determination of the question of benefits, and that the courts had no power in cases of special taxation, like they have in cases of special assessments, to consider or determine whether the property taxed was specially benefited or not, or, if benefited, the amount of such benefits. The only qualification of the rule or of the power of the municipality was, that the ordinance would be held void if unreasonable and oppressive: *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *Enos v. Springfield*, 113 Ill. 65; *Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686; *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067; *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *Bloomington v. Chicago etc. R. R. Co.*, 265 134 Ill. 451, 26 N. E. 366; *Davis v. Litchfield*, 155 Ill. 384, 40 N. E. 354, and many other cases. After the passage of the amendment of 1895 (Laws 1895, p. 100), incorporated later in the general act of 1897 relating to local improvements (Hurd's Stats. 1899, p. 362), we held in several cases which involved local improvements other than sidewalks that while the statute had changed the rule and the ordinance was no longer conclusive of the question of benefits, still, that an ordinance which did not limit the amount of the tax to the amount of benefits to be received was not necessarily void: *Hull v. People*, 170 Ill. 246, 48 N. E. 984; *Pfeiffer v. People*, 170 Ill. 347, 48 N. E. 979. The statute itself having provided such limitation, and also for a hearing upon the question of benefits on the application to the court for the confirmation of the assessment, there was no necessity to incorporate in the ordinance a similar provision. But the case at bar arises under the statute of 1875, providing additional means for constructing sidewalks, which statute makes no provision that the cost or amount of the tax shall be limited to the amount that the property will be benefited, nor for a hearing to ascertain such benefits, unless that question may be heard and determined in the county court on the application by the county collector for judgment against and an order of sale of property returned as delinquent for special assessments and taxes, and for general taxes for state, county, and other purposes.

Two questions are presented: 1. Is the general doctrine announced in the *Norwood* case applicable to the levy of a special tax under the act of 1875 to construct a sidewalk, upon failure of the property owner, after notice, to construct the same? And if so, does the statute in question, alone or in connection with other statutes, provide for a hearing where the property owner may have a judicial decision of the question whether or not his

property is specially taxed to an amount in substantial excess of the special benefits it will receive from the improvement?

²⁶⁶ The Norwood case involved a case of great hardship, where the effect of the decision, had the proceedings been held valid, would have been to allow the municipality, by first condemning the land and then levying the assessment, to compel the land owner not only to give without compensation the land for the street, but to pay the costs of the condemnation proceedings and of levying the assessment, without regard to the question of benefits and without any opportunity to have that question raised and decided; and it was said in the opinion: "If the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry, in any form, as to special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in respect of the land taken for the street, for by opening the street at his own cost he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special assessments upon property in order to meet the expense of public improvements in the vicinity of such property."

We recognize, of course, the binding force of the decisions of the supreme court of the United States construing the federal constitution, but we do not understand the decision in question to be applicable to the case at bar. If it is, then cities and villages will be unable to compel any lot owner to construct or pay for the construction of a sidewalk in front of his lot without first having a judicial determination that the cost of the walk will not exceed the benefit of such walk to the lot taxed, even where the costs of the proceedings would exceed the cost of the walk. It might, however, possibly be said that under the decision mentioned it could be held that such local improvements as sidewalks would not, as ²⁶⁷ a general rule, be "in substantial excess of the special benefits," and the legislative authority might well so assume. But however that may be, this court has held that the property owner is protected from arbitrary exactions, in such cases, by the rule (which it has not hesitated to enforce) that a municipal ordinance, to be valid, must be reasonable, and if it is unreasonable, unjust, and oppressive the courts will hold it void: *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373; *Title*

Guarantee etc. Co. v. Chicago, 162 Ill. 505, 44 N. E. 832; *Bloomington v. Chicago etc. R. R. Co.*, 134 Ill. 451, 26 N. E. 366; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143. In the latter case, respecting the constitutional power of the legislature to provide for the construction of sidewalks in cities and villages by special tax upon abutting lots according to frontage, this court said (96 Ill. 259): "Serious apprehensions are expressed lest, under the power to impose special taxation upon contiguous property for local improvements, cities may, in case of very expensive improvements, abuse the power, and under the form of its exercise practically confiscate private property to public use. So long as it is confined to sidewalks there is little cause for such apprehension. It will be time enough to consider the question when a case of oppression occurs. Meanwhile it may not be amiss to suggest that all this must be done, if at all, by ordinance; and it must be remembered that ordinances, to be valid, must be reasonable—not unfair or oppressive—and must spring from an honest exercise of legislative discretion." So if the owner of a lot of small value, in complying with an ordinance to construct a sidewalk in front of his property, were required to fill up or bridge a chasm or to dig down a hill or blast out a ledge of rock in order to construct the walk, and in doing so would necessarily incur such an expense as would be unreasonable and oppressive for him to bear in view of the value of his property and the special benefits it would receive, the ordinance would be without binding force and void, because ²⁶⁸ of its unreasonable and oppressive character. But we do not know that it has ever been held that the test of reasonableness is the exact equality of the burdens imposed and the benefits received. In the case at bar no attempt was made to show that the special tax exceeded the special benefits, or that the ordinance was unreasonable or oppressive for any reason, and it certainly does not, on its face, so appear, as did the ordinance in the *Norwood* case.

Our conclusion on this branch of the case is, that the point made by appellants that the ordinance and statute itself are in conflict with the fourteenth amendment of the federal constitution, and void for that reason under the decision of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, is not well taken and cannot be sustained.

But if it should be considered that the rule there announced is applicable to the construction of sidewalks as well as to other local improvements, still, we are of the opinion that the property

owner has, under the act of 1875 and the general revenue laws, an adequate legal remedy, and an opportunity to be heard in the county court, and there have decided the question whether the special tax imposed to build the walk is in substantial excess of special benefits received, and whether or not, for any reason, the ordinance is unreasonable or oppressive. Section 4 of that act (Laws 1875, p. 64) provides that upon failure to pay the tax the city clerk shall, within such time as may be provided by the ordinance, make report in writing, under oath, to such general officer of the county as may be authorized by law to apply for judgment against lands and sell the same for taxes due the county or state, of all of the lots upon which the special tax shall be unpaid, with the names of the owners and the amount due on each lot. Section 5 then proceeds as follows: "When said general officer shall receive the aforesaid report, he shall at once proceed to obtain judgment against said lots or parcels of land for ~~the~~ said special tax remaining due and unpaid, in the same manner as may be provided by law for obtaining judgment against lands for taxes due and unpaid the county and state, and shall in the same manner proceed to sell the same for the said special tax due and unpaid. In obtaining said judgment and making said sale, the said officer shall be governed by the general revenue laws of the state, except when otherwise provided herein." And the general revenue act provides for notice of the time and place of applications for judgment and order of sale, and for a hearing, at such time and place, of objections filed by any person interested, and provides that the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be. We see no reason why the property owner may not file his objection to the rendition of judgment against his property and have a hearing thereon, and, if the judgment is unsatisfactory, take his appeal as in other cases. If we are correct in this view, it cannot be said that the statute does not provide any opportunity to the property owner to be heard upon the question whether the tax is in substantial excess of the special benefits received from the improvement. Such an objection was made and filed in the county court in *People v. Yancey*, 167 Ill. 255, 47 N. E. 521, but the ordinance in the latter case was held void on another ground.

Whether or not, on the hearing of the application for judgment and order of sale, the county court would have the power to reduce the assessment to the amount of special benefits as shown

by the evidence, it is not necessary in this case to decide, but, as heretofore decided, all questions affecting the validity of the ordinance may be determined on such hearing.

Finding no error in the record the decree must be affirmed.

IN OUR NOTE TO WILSON v. TRENTON, 68 Am. St. Rep. 716, we referred to the opinion of the supreme court of the United States in *Norwood v. Baker*, 172 U. S. 208, 19 Sup. Ct. Rep. 187, and expressed the conclusion that: "This decision seems to leave a property owner in every instance in which an assessment is imposed upon his property for work upon a public street or other public improvement, the right to resist such assessment by showing that his property had not been benefited to an amount equal to the assessment." Such we then understood that decision to be, and it was subsequently so construed by various state courts (*Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379; *Hutcheson v. Storrie*, 92 Tex. 683, 71 Am. St. Rep. 884, 51 S. W. 848; *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164, 76 Am. St. Rep. 354), though others professed to see in it only a decision addressed to circumstances of peculiar hardship (*Adams v. Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 57 N. E. 114; *Job v. Alton*, 189 Ill. 256, ante, p. 448, 59 N. E. 622), and nothing forming an impediment to the exercise by the state of the power to impose upon property a charge for its improvement estimated upon its frontage and not proportioned to, and often in excess of, the total benefits conferred. In a series of cases decided by the supreme court of the United States on the twenty-ninth day of April, 1901, three of its judges dissenting, that court put at rest all doubts upon that question. In the prevailing opinion, after considering at length pre-existing decisions, the court said: "We do not deem it necessary to extend this opinion by referring to the many cases in the state courts in which the principles of the foregoing cases have been approved and applied. It will be sufficient to state the conclusions reached, after a review of the state decisions, by two text-writers of high authority for learning and accuracy:

"The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

"The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.

"The whole cost in other cases is levied on lands in the immediate vicinity of the work.

"In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The

question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule': Cooley on Taxation, 447.

"The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency': 2 Dillon on Municipal Corporations, 4th ed., sec. 752.

"This array of authority was confronted, in the courts below, with the decision of this court in the case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law, under which the improvement is made, provides for a preliminary hearing as to the benefits to be derived by the property to be assessed. But we agree with the supreme court of Missouri in its view that such is not the necessary legal import of the decision in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187. That was a case where by a village ordinance, apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the costs and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessment upon Mrs. Baker's property, but said: 'It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of the opening of the street as was found upon due and proper inquiry to be equal to the special benefits ac-

cruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the state.'

"That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in *Parsons v. District of Columbia*, 170 U. S. 45, 56, 18 Sup. Ct. Rep. 521, and in *Spencer v. Merchant*, 125 U. S. 345, 357, 8 Sup. Ct. Rep. 921.

"It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty, or property without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187. But there is no such a state of facts in the present case. Those facts are thus stated by the court of Missouri: 'The work done consisted of paving with asphaltum the roadway of Forest avenue in Kansas City, thirty-six feet in width, from Independence avenue to Twelfth street, a distance of one-half a mile. Forest avenue is one of the oldest and best improved residence streets in the city, and all of the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in distance and quality. There is no showing that there is any difference in the value of any of the lots abutting on the improvement.' What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the state as consistent with the constitutional principles": *French v. Barber etc. Co.*, 181 U. S. 324, 21 Sup. Ct. Rep. 625; *Wight v. Davidson*, 181 U. S. 371, 21 Sup. Ct. Rep. 616; *Tonawanda v. Lyon*, 181 U. S. 389, 21 Sup. Ct. Rep. 609; *Webster v. Fargo*, 181 U. S. 394, 21 Sup. Ct. Rep. 623; *Cass etc. Co. v. Detroit*, 181 U. S. 396, 21 Sup. Ct. Rep. 644; *Detroit v. Parker*, 181 U. S. 399, 21 Sup. Ct. Rep. 624; *Wormley v. District of Columbia*, 181 U. S. 402, 21 Sup. Ct. Rep. 609; *Allen v. District of Columbia*, 181 U. S. 402, 21 Sup. Ct. Rep. 609; *Shumate v. Heman*, 181 U. S. 402, 21 Sup. Ct. Rep. 645.

KILEY v. CHICAGO CITY RAILWAY COMPANY.

[189 Ill 384, 59 N. E. 794.]

STREET RAILWAYS—WRONG TRANSFER—RIGHTS OF PASSENGER.—It is the duty of a street-car passenger, if the transfer slip tendered by him as fare is refused, to either pay fare or leave the car at the request of the conductor. If the passenger refuses so to do and sustains injury in resisting expulsion from the car, he cannot recover therefor, except upon proof that more force was used than was reasonably necessary.

STREET RAILWAYS—WRONG TRANSFER—EXPULSION—REMEDY.—If a street-car passenger, on the transfer slip tendered by him as fare being refused, pays his fare or leaves the car at the request of the conductor, and the mistake in the transfer is the fault of the company, the passenger is entitled to recover the cost of his fare, such damages as he sustained on account of the delay caused by the expulsion, all additional expense necessarily occasioned thereby, together with reasonable damages for the indignity in being expelled from the car.

A. Q. Reynolds, Shope, Mathias & Barrett, for the appellant.

W. J. Hynes, W. J. Ferry, and M. B. Starling, for the appellee.

387 HAND, J. This is an action by appellant, in the superior court of Cook county, against appellee, to recover damages for a forcible expulsion of appellant from a street-car in the city of Chicago. The declaration consists of three counts, charging, in various forms, that while the plaintiff was lawfully upon the car of the defendant she was forcibly ejected and expelled therefrom by the conductor of the defendant in charge of said car, and thereby greatly injured. The defendant pleaded the general issue, also a special plea, in which it was alleged the plaintiff took passage on said car; that she refused to pay her fare or leave the car upon request; that she resisted the conductor's efforts to remove her, whereby the injury to her occurred, and that no more force was used in her removal than was necessary. To the special plea plaintiff replied generally that the defendant committed the said several trespasses of its own wrong. The trial resulted in a verdict in favor of plaintiff for one dollar, upon which the court rendered judgment, which judgment has been affirmed by the branch appellate court for the first district, and this appeal has been prosecuted to reverse such judgment of affirmance.

The evidence tends to establish that plaintiff boarded the Thirty-first street car of the defendant on the morning of the 27th of June, 1896, at Michigan avenue, for the purpose of

going from her home to the Stock Exchange building, located near the center of the business part of the city. She paid the conductor her fare and requested of him a transfer over appellee's Wentworth avenue line. She received from him a transfer slip or ticket. At Wentworth avenue she left the Thirty-first street car and boarded a Wentworth avenue car going north. To the ³⁸⁸ conductor upon said car she tendered the transfer, but he refused to accept it on the ground that it did not entitle plaintiff to ride upon said line, the conductor upon the Thirty-first street line having by mistake given the plaintiff a wrong transfer slip. The plaintiff insisted the conductor must accept the transfer she offered, refused to pay her fare, and declared she would ride upon that transfer. The conductor insisted she pay her fare or get off. Upon her declining to do so he stopped the car and ejected her. Whatever injury occurred to the plaintiff was occasioned at the time of her removal from the car.

The court instructed the jury that it was the duty of the plaintiff to either pay her fare or leave the car upon the request of the conductor, and that after her refusal so to do, if she sustained any injury in resisting ejection from the car she could not recover for such injury, unless the evidence showed the conductor used more force than was reasonably necessary to put her off the car.

As we understand appellant's brief, it is substantially admitted that the jury were correctly instructed as to the law, if the rule as announced by this court in the cases of *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499, *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232, and *Pennsylvania R. R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238, is to be adhered to and applied to street-cars and passengers thereon. In the *Griffin* case the plaintiff purchased a ticket at Mendota from that station to Earl, but the ticket agent inadvertently gave him one to Meriden, an intermediate station. Upon his refusal to pay his fare from Mendota to Earl or peaceably leave the car he was ejected. It was there said (page 504): "The law will not permit a passenger to interpose resistance to every trivial imposition to which he may really feel or imagine himself exposed by the employes that must be overcome by counter-force in order to preserve subordination. It is due to good order and the comfort of the other passengers that he should submit for the time being, and redress ³⁹⁰ his grievances, whatever they may be, by a civil action." In the *Reed* case the plaintiff had purchased a ticket for a particular berth in a sleeping-car and had lost it after

entering the car. He refused to pay a second time and was forcibly expelled after producing proof that he had purchased a ticket for a berth. It was held that the plaintiff was only entitled to recover the price paid for the ticket and reasonable compensation for the trouble and inconvenience he suffered by being deprived of a berth in the sleeping-car. In the Connell case the plaintiff, not having a proper ticket and refusing either to pay his fare or peaceably leave the train upon the request of the conductor, was ejected. The court say (page 305): "We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton. When the conductor demanded that appellee should pay fare or leave the train, he would have been justified in refusing to pay fare and in leaving the train on the command of the conductor, and had he done so he would have received no personal injuries, and might then have brought his action and recovered, as before stated; but when he refused to leave the train, and thus compelled the conductor to resort to force, he cannot recover for an injury which he voluntarily brought upon himself. The conductor was ordered by his superior not to receive a ticket like the one presented. This order he was bound to obey, and, so far as appears, he acted in good faith, and when appellee was notified by the conductor that his ticket was not good and would not be received, it was his duty to ~~and~~ leave the train in a peaceable manner and hold the company responsible for the consequences, rather than resist or undertake to retain his place on the train by force. A train crowded with passengers—often women and children—is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise and dangerous to the traveling public to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed, or the passenger should in a peaceable manner leave the train and seek redress in the courts, where he will find a complete remedy for every indignity offered and for all damages sustained."

The doctrine announced in these cases is, in our opinion, sound, and while cases may be found holding to the contrary, so far as we have been able to determine it is supported by the weight of authority: Poulin v. Canadian Pac. Ry. Co., 52 Fed. 197; New York etc. Ry. Co. v. Bennett, 50 Fed. 496; Bradshaw v. South Boston R. R. Co., 135 Mass. 407, 46 Am. Rep. 481; Townsend v. New York Cent. etc. R. R. Co., 56 N. Y. 295, 15 Am. Rep. 419; Downs v. New York etc. R. R. Co., 36 Conn. 287, 4 Am. Rep. 77; McClure v. Philadelphia etc. R. R. Co., 34 Md. 532, 6 Am. Rep. 345; Petrie v. Pennsylvania R. R. Co., 42 N. J. L. 449; Shelton v. Lake Shore etc. Ry. Co., 29 Ohio St. 214; McKay v. Ohio River Ry. Co., 34 W. Va. 65, 26 Am. St. Rep. 913, 11 S. E. 737; Hufford v. Grand Rapids etc. Ry. Co., 53 Mich. 118, 18 N. W. 580; Van Dusan v. Grand Trunk Ry. Co., 97 Mich. 439, 37 Am. St. Rep. 354, 56 N. W. 848; Yorton v. Milwaukee etc. Ry. Co., 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482; Woods v. Metropolitan Street Ry. Co., 48 Mo. App. 125; Percy v. Metropolitan Street Ry. Co., 58 Mo. App. 75; Atchison etc. R. R. Co. v. Gants, 38 Kan. 618, 5 Am. St. Rep. 780, 17 Pac. 54; Peabody v. Oregon Ry. etc. Co., 21 Or. 121, 26 Pac. 1053.

We have no question that the rule announced in the foregoing cases applies with equal force to street railways and to passengers thereon. In Bradshaw v. South Boston Ry. Co., 135 Mass. 407, 46 Am. Rep. 481, the plaintiff was a passenger ⁸⁹¹ upon one of the several street-car lines owned by defendant. Desiring to be transferred from one line to another he asked for and received a transfer check, to which he was entitled by the rules of the company, but which, by mistake of the conductor, was for use upon a line other than the one over which he wished to go. He did not read it, but upon presenting it to the conductor of the line over which it should have read the conductor refused to receive it, and, as the plaintiff refused to pay fare, ejected him. The action was brought to recover damages for such ejection. In deciding the case the court say, on page 410 (135 Mass.): "It is a reasonable practice to require a passenger to pay his fare or to show a ticket, check, or pass, and in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket and has failed to do so, he is not at liberty to assert and maintain by force his rights under that con-

tract, but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way."

When the conductor demanded that plaintiff pay her fare or leave the car, she would have been justified in refusing to pay and in leaving the car on the command of the conductor and holding appellee responsible for the consequences, and had she done so, instead of resisting the conductor, she would not have received the injuries complained of.

We find no reversible error in this record. The judgment of the appellate court will therefore be affirmed.

A RAILROAD TICKET IS BUT EVIDENCE of the contract of carriage between a carrier and a passenger. One who makes a valid contract is entitled to passage according to its terms, even though the ticket given him is defective in failing to express those terms, and if he is expelled from the train on account of such defective ticket, the carrier is liable for all proximate damages resulting therefrom. This rule applies to a transfer ticket issued by a conductor on a street railway: *O'Rourke v. Citizens' St. Ry. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W. 872. Compare *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65, 26 Am. St. Rep. 913, 11 S. E. 737.

SPRINGER v. FORD.

[189 Ill. 430, 59 N. E. 953.]

ELEVATORS—CARE REQUIRED OF OWNERS.—Persons operating elevators in buildings for the purpose of carrying persons from one story to another are common carriers of passengers, required to exercise the highest and utmost care and diligence to prevent injury to them.

ELEVATORS—PRESUMPTION OF NEGLIGENCE FROM ACCIDENT.—If a passenger is injured by reason of the giving way of some portion of the machinery or appliances by which an elevator is operated, this, unexplained, raises a presumption of negligence on the part of the owner, or his servants.

ELEVATORS—PASSENGER AND FREIGHT.—Rules governing the liability of owners or operators of passenger elevators apply with equal force to freight elevators run for hire, and carrying persons rightfully thereon.

ELEVATORS—CARRIERS OF PASSENGERS FOR HIRE.—The proprietor of an elevator run for the use of the tenants of an office building is a carrier of passengers for hire.

ELEVATORS—RIGHT TO RIDE.—Whether a person was lawfully on an elevator at the time of injury, in the performance of a duty incident to his employment, is a question of fact for the jury.

ELEVATORS—LIMITATION OF LIABILITY.—A condition in a lease that the owner of the building shall not be liable for any damages caused by a failure to keep an elevator therein in repair is not binding upon a servant of the lessee who is injured while upon such elevator. A carrier of passengers cannot limit his liability except by express contract with the passenger.

ELEVATORS—EVIDENCE.—In an action to recover for injury received while riding on a freight elevator, evidence is admissible to show that it was plaintiff's custom, as well as the custom of other tenants and employes in the building, to accompany freight being transported by them in such elevator operated by the defendant or his servants.

W. N. Gemmill, for the appellant.

S. F. Crews and R. Crews, for the appellee.

⁴³³ **HAND, J.** This is an action brought by the plaintiff to recover damages for an injury to his person. The trial resulted in a verdict and judgment for the plaintiff, which judgment has been affirmed by the appellate court for the first district.

The plaintiff was in the employ of the Kinsella Glass Company, a tenant of the defendant, occupying the sixth floor of an eight-story building, of which the defendant is the owner, located on Canal street, in the city of Chicago. The building was equipped with a passenger and a freight elevator, both of which were operated and controlled by the defendant. The falling of the freight elevator while plaintiff, in the discharge of his duty, was a passenger thereon caused the injury complained of.

⁴³⁴ At the close of the plaintiff's testimony, and again at the close of all the testimony, the defendant moved the court to instruct the jury to find the defendant not guilty, which the court declined to do, and the action of the court in that behalf has been assigned as error.

The law is well settled that persons operating elevators in buildings for the purpose of carrying persons from one story to another are common carriers of passengers: *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178; *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, 42 N. W. 873; *Mitchell v. Marker*, 62 Fed. 139; *Treadwell v. Whittier*, 80 Cal. 575, 13 Am. St. Rep. 175, 22 Pac. 166; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 423; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010; *Lee v. Knapp*, 55 Mo. App. 390; *Tousey v. Roberts*, 114 N. Y. 312, 11 Am. St. Rep. 655, 21 N. E. 399; *Southern Bldg. Assn. v. Lawson*, 97 Tenn. 367, 37 S. W. 86. In *Hartford Deposit Co. v. Sollitt*, 172 Ill. 225, 50 N. E. 179, 64 Am. St. Rep. 37, we say: "Persons oper-

ating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings." In *Treadwell v. Whittier*, 80 Cal. 575, 13 Am. St. Rep. 175, 22 Pac. 166, it was said: "The defendants used their elevator in lifting persons vertically to the height of forty feet. That they were carriers of passengers, and should be treated as such, we have no doubt. The same responsibilities as to care and diligence rested on them as on the carriers of passengers by stage-coach or railway." In *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, 42 N. W. 873, the court say: "The relation between the owner and manager of an elevator for passengers and those carried in it is similar to that between an ordinary common carrier of passengers and those carried by him."

The operators of such elevators, upon the grounds of public policy, are required to exercise the highest degree of care and diligence. The lives and safety of a large number of human beings are intrusted to their care, and the law requires them to use extraordinary diligence in and about the operation of such elevators to prevent injury ⁴³⁵ to passengers being carried therein. In *Hartford Deposit Co. v. Sollitt*, 172 Ill. 225, 64 Am. St. Rep. 37, 50 N. E. 179, it is said: "It is a duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators, so as to prevent injury to persons therein." And in *Treadwell v. Whittier*, 80 Cal. 575, 13 Am. St. Rep. 175, 22 Pac. 166, the court say: "Persons who are lifted by elevators are subjected to great risks to life and limb. They are hoisted vertically, and are unable, in the case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control, by which their lives or limbs are put at hazard or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments to avoid injury to those they carry. The care and diligence required is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised. Where the danger is great the

utmost care and diligence must be employed. In such cases the law requires extraordinary care and diligence." And in *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 702, 42 N. W. 874, it is said: "The same reason exists for requiring on the part of the owner [of an elevator] the utmost care and foresight and for making him responsible for the slightest degree of negligence."

When a passenger is injured by reason of the giving way of some portion of the machinery or appliances by which the elevator is operated, the presumption of negligence from such breaking, unexplained, arises. In *New York etc. R. R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, we say on page 48 (160 Ill., 43 N. E. 811): "The happening of an accident to a passenger during the course of his transportation ⁴³⁶ raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests upon the carrier. Undoubtedly, the law requires the plaintiff to show that the defendant has been negligent. But where the plaintiff is a passenger, a prima facie case of negligence is made out by showing the happening of the accident. If the injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, a presumption of negligence on its part is raised." And in *Hartford Deposit Co. v. Sollitt*, 172 Ill. 225, 64 Am. St. Rep. 37, 50 N. E. 179, it is said: "The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed." In the case of *Ellis v. Waldron*, 19 R. I. 369, 33 Atl. 869, in an action by the servant of a tenant of a building against the owner for injuries caused by the falling of an elevator, the declaration alleged that the defendant had granted to the plaintiff's employer, as part of his leasehold interest in the premises, the use of the elevator for moving his goods; that at the time of the accident the plaintiff was upon the elevator, engaged in the employment of moving his master's goods; that the machinery in the elevator was defective and unsafe, of which he had no knowledge, but which fact was known to the defendant, or should have been known if he had exercised a proper amount of diligence. The court held that the declaration alleged sufficient facts to show that it was the duty of the defendant to keep and maintain the elevator in a safe and suitable condition for the plaintiff's use, as the employé of the tenant; and, further, that the elevator not being under the control of plaintiff, it was not his duty to examine it

and ascertain whether it was suitable and safe, and hence he was not required to allege specifically the nature of the defect which caused the accident.

The contention on behalf of defendant, that the principles above announced have no application to a person ⁴³⁷ owning and operating a freight elevator, is not tenable when a passenger is lawfully and rightfully upon such elevator. Such passenger, by reason of the construction of that class of elevators, is subjected to great risks and many hazards. The liability, however, of the owner or manager thereof as a common carrier is measured by the same rules, and he is held to the same degree of diligence, as that of persons owning and operating passenger elevators. In the case of *Chicago etc. R. R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, where a passenger upon a freight train was held entitled to recover for a personal injury received by reason of the negligent management of the train, it was said (144 Ill. 271): "From the composition of such a train and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in traveling by freight train as there is by passenger trains, but the same degree of care can be exercised in the operation of each." And in *New York etc. R. R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, it was held a drover riding on a railway freight train in charge of cattle he was shipping might recover for an injury received by the negligent management of the train. On page 48 (160 Ill.) the court say: "A carrier will be held to the same strict accountability for the negligence of its servants resulting in injury to a passenger who is lawfully and properly on a freight train, as governs its liability for such negligence when the transportation is upon a train devoted to passenger service exclusively."

In the case of *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178, we held that the owner of a passenger elevator was subject to all the rules and liabilities of any other carrier of passengers, and there is no reason, in principle, why the analogy held to exist between passenger and freight trains, as common carriers, does not exist between passenger and freight elevators, in cases where the owners of freight elevators permit the carriage of passengers thereon for hire. The proprietor of an elevator run for ⁴³⁸ the use of the tenants of an office building is a carrier of passengers for hire. The proprietor's compensation is the rental paid him by the tenant: 10 Am. & Eng. Ency. of Law, 2d ed., 946.

The question as to whether the plaintiff was lawfully on the elevator at the time of the injury, in the performance of a duty incident to his employment, was a question of fact for the jury: *Stewart v. Harvard College*, 12 Allen, 58. That the elevator fell, that the plaintiff was rightfully a passenger thereon, and that he was seriously injured by its fall, was clearly shown by the plaintiff's testimony. The trial court did not, therefore, err in declining to take the case from the jury.

The provision in the lease of the defendant to the Kinsella Glass Company, to the effect that the defendant should "not be liable for any damages occasioned by a failure to keep said premises and elevator in repair," was not binding upon plaintiff. He was not a party thereto. A carrier of persons cannot limit his liability to a passenger except by express contract with the passenger.

The court did not err in permitting the plaintiff to prove that it was his custom, as well as the custom of the employes of other tenants in the buildings, to accompany freight being elevated or lowered by them on said elevator while such elevator was being operated by the agent of defendant. Such evidence was properly admitted as tending to show that plaintiff was rightfully upon said elevator at the time of the accident.

The jury were properly instructed. All the refused instructions were covered by instructions given or are in conflict with the views herein expressed.

We find no error in this record. The judgment of the appellate court will therefore be affirmed.

ELEVATORS.—THOSE WHO OPERATE passenger elevators are carriers of passengers, and must use extraordinary care in and about their operation: *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178; *Southern Building etc. Assn. v. Lawson*, 97 Tenn. 367, 56 Am. St. Rep. 804, 37 S. W. 86.

ELEVATOR ACCIDENT.—THE BURDEN OF PROOF, in case of the giving way of an elevator, is on the owner to show that it occurred through no fault of his: See the monographic note to *Southern Building etc. Assn. v. Lawson*, 56 Am. St. Rep. 807.

FREIGHT ELEVATORS—PASSENGERS ON.—The liability of the owner or operator of freight elevators to passengers riding therein is considered in *Henson v. Beckwith*, 20 R. L. 165, 78 Am. St. Rep. 847, 37 Atl. 702; monographic note to *Southern Building etc. Assn. v. Lawson*, 56 Am. St. Rep. 809, 810.

ELEVATORS—LANDLORD AND TENANT.—On the relative liabilities of the landlord and tenant in case of accident in the operation of elevators in the leased premises, see *Henson v. Beckwith*, 20 R. L. 165, 76 Am. St. Rep. 165, and note, 37 Atl. 702.

ABBOTT v. ABBOTT.

[189 ILL. 488, 59 N. E. 958.]

DEEDS—ALTERATION OF—SUBSTITUTION OF GRANTEEES.—If a deed is altered by the substitution of grantees after final delivery, and without the consent of the first grantee, it cannot support a claim to the land conveyed by the deed, asserted by the person whose name is substituted.

DEEDS—ALTERATION OF—SUBSTITUTION OF GRANTEEES.—If a deed is altered after final delivery, by the substitution of grantees with the consent of the first grantee, it becomes absolutely void. The first grantee cannot thereafter repudiate the substitution of grantees and claim title in himself.

DEEDS—ALTERATION OF—SUBSTITUTION OF GRANTEEES.—If a deed is altered by the substitution of grantees after delivery to the first grantee, with his consent and that of the grantor, and again subsequently delivered, the deed is valid.

DEEDS—PRESUMPTION OF DELIVERY TO MINOR.—The presumption in favor of the delivery of a voluntary deed to a minor can be overcome only by clear proof on the part of the grantor that there was no such delivery.

Dill & Wilderman and B. O. Davidson, for the appellants.

Hamill & Borders and Turner & Holder, for the appellee.

495 WILKIN, J. The attempt to ingraft this suit by cross-bill upon the divorce proceeding after the decree in that action had been rendered was wholly irregular. The sworn allegations of the principal parties in the petition for alimony pendente lite and bill for injunction, and the answers thereto, as well as the testimony in support of and against these allegations, are irreconcilable with the claim of each of them to the ownership of the property here made. These matters are not, however, now of controlling importance.

The claim of L. D. Abbott and H. M. Bradford, denied in the cross-bill of Cora Belle and Fern Abbott, was a mechanic's lien for labor and material in erecting improvements upon the East St. Louis property, and was abandoned before the final hearing. There is no controversy in this court, nor was there below, between Cora Belle Abbott and the daughter Beatrice as to the title to the north half of the northeast quarter of section 19, township 21, range 1 west, in McPherson county, Kansas, and, confessedly, so much of the decree as divests the title of the daughter to that tract and vests it in the mother is erroneous, and counsel for appellee say that it was inserted by inadvertence. The only issue, therefore, submitted to us for decision is between the appellant, Cora Belle Abbott, and the appellee, George B.

Abbott, as to the title to lots 154 and 155 in Illinois City (now part of the city of East St. Louis), and to the west half of the southeast quarter of section 18, township 21, etc., in Kansas. This issue, if raised at all, is presented by the amended crossbill of George B. Abbott filed June 28, 1900. It is, as we understand, conceded—at least, it is not denied—that if the title to the property described in the several deeds executed by George B. Abbott and wife vested the legal title in the grantees, their children, no sufficient reason, in law or equity, ⁴⁹⁶ is shown, either by the allegations of the bill or by the proofs, to authorize a court of equity to divest the grantees of that title and reinvest it in the grantor, George B. Abbott; and the decree below manifestly proceeds upon that theory by sustaining the title of Beatrice Abbott to the north half of the northeast quarter of section 19 and the Goethe avenue lot in East St. Louis, and the title in Fern Abbott to the east half of the southeast quarter of section 18 in Kansas.

If the finding and decree as to lots 154 and 155 can be sustained, it must be upon the contention that the evidence shows that the deed from the Highland Brewing Company, executed May 21, 1897, was changed after its delivery without the consent of George B. Abbott, as alleged in his bill. That the erasure of his name as grantee in that deed and the insertion in its stead of the name of Fern Abbott after it was delivered, without the knowledge, consent, or procurement of the said George B. Abbott, would have no effect upon the validity of his title as between these parties, is too clear to become the subject of controversy. "Where a deed is altered by the substitution of grantees it cannot support a claim to the land conveyed by the deed, asserted by the person whose name is substituted": *Hollis v. Harris*, 96 Ala. 288, 11 South. 377; *Hill v. Nisbet*, 58 Ga. 586; *Wilds v. Bogan*, 55 Ind. 331; 1 *Devlin on Deeds*, sec. 469; *Robbins v. McGee*, 76 Ind. 381. If the change was made after the delivery of the deed to George B. Abbott, even with his consent, for the purpose of transferring the title to his daughter, Fern Abbott, it would be ineffectual for that purpose and render the deed absolutely void as a transfer of the title. In that case, however, if George B. Abbott himself procured the change to be made, he could not repudiate it afterward and claim title in himself notwithstanding the alteration, and, therefore, to sustain his contention that the title is still in him, he must have shown by proofs that such title vested in him by a delivery of the deed prior to the ⁴⁹⁷ alteration, and that he did not make the change

or consent that it should be made. We are not able to see how it can be said, upon the evidence in this record, that he did not consent to or authorize the substitution of the name of his daughter for his own as the grantee in that deed. His own testimony is irreconcilable with any other conclusion. And that of the witness Guignon, who acted in the transaction for both parties—the Highland Brewing Company and George B. Abbott—tends very strongly to prove that the change was made by the consent of both the grantor and grantee. The question left most in doubt is whether the change was made before or after the delivery. It is doubtless true that the deed passed into the hands of George B. Abbott with his name inserted therein, but we think from all the evidence, and especially from that of Abbott himself and Guignon, and the correspondence between the latter and the grantor, the Highland Brewing Company, it is sufficiently shown that the change was made before the final delivery of the instrument and with the consent of both parties thereto. If a deed is altered after delivery, by consent of both parties, and again delivered after the change, the deed will be valid: *Stiles v. Probst*, 69 Ill. 382. It is impossible to believe from the testimony in this case that George B. Abbott did not know that the name of his daughter had been substituted for his own as grantee in that deed at the time he finally received and accepted it, and when he caused it to be recorded.

As to the west half of the southeast quarter of section 18, etc.: The deed from George B. Abbott and wife to their infant son, Leslie, contains the following clause: "Provided, and this deed is made with the express condition that said G. Leslie Abbott shall not sell, nor deed, nor mortgage, nor lease for a longer term than one year at a time the said land until he shall arrive at the age of forty years, but should he die prior to that time, then and in that event all of the above-described real estate ⁴⁹⁸ shall belong to L. Fern Abbott, his sister, and her title thereto shall be perfect and absolute; and should he, G. Leslie Abbott, die, then L. Fern Abbott may sell or mortgage and give a good title thereto."

Counsel for the appellants, in their argument, seem to have anticipated a question—not raised by the bill—as to the sufficiency of this deed to convey the title to the sister, Fern Abbott, and have argued with ability, and, we think, successfully, in support of the proposition, "that where the fee in the first taker created by a deed is made determinable as upon the happening of a valid condition subsequent, followed by a limitation

over of the fee or use to another upon the happening of the prescribed event, the fee or use shifts from the first to the second taker, whereby the deed is a conveyance under the statute of uses, as all our American deeds are, and is a clear case of shifting use." 2 Washburn on Real Property, sec. 285, 4 Kent's Commentaries, sec. 296, Smith v. Smith, 23 Wis. 176, 99 Am. Dec. 153, Camp v. Cleary, 76 Va. 142, Outland v. Bowen, 115 Ind. 150, 7 Am. St. Rep. 420, 17 N. E. 281, Cornwell v. Wolf, 148 Mo. 545, 50 S. W. 439, and other authorities cited, support the proposition.

The question does not, however, arise on this record, there being nothing in the pleadings upon which to base it, nor is it controverted by counsel for appellee. Their sole contention is, that the proof shows that that deed was never delivered. The testimony of George B. Abbott, as well as the allegations of his bill, clearly shows that he executed these deeds to his children for the purpose and with the intent of placing the legal title to the premises described in his children, then infants of tender years. That he kept the deeds in his own possession may be true, but he voluntarily put them upon record. And as to this deed to the son, he testified upon the hearing on the petition for temporary alimony that he actually delivered it to the child. The presumption in favor of the delivery of voluntary deeds to infant children is strong, and the burden is upon the grantor to ~~show~~ show clearly that there was no delivery: Bryan v. Wash, 2 Gilm. 557; Masterson v. Cheek, 23 Ill. 72; Crabtree v. Crabtree, 159 Ill. 342, 42 N. E. 787, and cases there cited.

There is another insuperable obstacle in the way of the affirmance of the decree below as to this Kansas land. Both the original and amended cross-bills proceed upon the theory that the legal title to the Kansas land was vested in the children, the only claim being that they held it in trust for the benefit of the grantor and his family. There is no allegation that the deed to the son, Leslie, was not delivered, and even if the proof was as contended by counsel for appellee, it would avail nothing for the want of a corresponding allegation in the pleadings. Upon what reasoning it can be said that the title failed to pass to the son for want of a delivery of his deed, but that the title to the other tracts passed to the daughters, we are unable to perceive. The same allegations and proof as to the delivery of the several deeds apply to all of them, and, we think, fully sustain the finding and decree of the circuit court as to the conveyances to Fern

and Beatrice. For like reasons it should have sustained the conveyance to the son, Leslie.

On the allegations and proofs in this record the decree below as to the eighty acre tract of Kansas land and lots 154 and 155, vesting the title in the appellee, George B. Abbott, and also as to the eighty acre tract owned by Beatrice, to which the title is vested in Cora Belle Abbott, must be reversed. In other respects it will be affirmed. The cause will be remanded to the circuit court with directions to enter a decree accordingly.

CARTER, J., concurring. While I agree that the decree should be reversed, I think it should have been held that the court below had no jurisdiction over the lands in the state of Kansas and no power to set aside conveyances of such lands or to vest or revest titles thereto in anyone.

A DEED ALTERED after its execution is thereby avoided, unless the alteration was made with the consent of the grantor: *Campbell v. McArthur*, 2 Hawks, 33, 11 Am. Dec. 738. It has been held, however, that a deed, valid when executed, passes title which is not divested by the grantee's subsequently unauthorized alteration, and that such deed may be given in evidence to prove the conveyance and the existence of title in the grantee: *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 South. 440.

SHIELDS v. BUSH.

[189 Ill. 534, 59 N. E. 962.]

DEEDS—DELIVERY.—If a voluntary conveyance from husband to wife is recorded by the grantor with the knowledge and consent of the grantee, and is subsequently in her possession, and after her death is found in the possession of her father, and the grantor, after the execution of the deed, has expressed satisfaction with what he has done, and has announced that it is his intention thereby to give the property to his wife, there is a valid delivery of such deed.

DEEDS—PRESUMPTION OF DELIVERY.—Although the act of recording a deed does not amount to a delivery, yet when it appears that the grantee therein has knowledge of such recording and has assented thereto, and the recorded deed is subsequently found in his possession, this amounts to prima facie evidence of delivery.

DEEDS—DELIVERY.—Anything which clearly manifests the intention of the grantor in a deed and the person to whom it is delivered that the deed shall presently become operative and effectual, and whereby the grantor loses all control over it, constitutes a sufficient delivery.

DEEDS.—DECLARATIONS OF THE GRANTOR in a deed made prior or subsequently to its execution are not admissible to

Impeach it; but his subsequent declarations showing that he is satisfied with the deed are admissible to uphold it.

DEEDS.—PRESUMPTIONS OF DELIVERY of deeds are stronger in cases of voluntary settlements than in cases of ordinary bargain and sale deeds.

DEEDS—HOMESTEAD—JOINDER OF WIFE.—A conveyance of the homestead not exceeding in value the statutory limit by a husband to his wife is void, unless she joins in and acknowledges the conveyance.

EQUITY—RELIEF UNDER GENERAL PRAYER.—If a bill in chancery contains a general prayer for relief, it is regarded as sufficient to support any decree warranted by the facts alleged.

EQUITY—RELIEF UNDER GENERAL PRAYER.—If a bill in chancery prays that a deed to a homestead and farm property be set aside, or if such relief cannot be granted that the court construe the deed and determine whether any title or estate passed thereby, the court may, on setting aside the deed as to the homestead, declare it valid as to the farm property, although no cross-bill is filed.

D. D. Donahue, for the appellant.

J. T. Lillard, for the appellees.

539 MAGRUDER, J. 1. The original and amended bills in this case charge that the deed executed by the appellant to his deceased wife, Catherine Shields, on December 22, 1893, was never delivered to her; and this charge in the bill is denied by the adult defendants in their answer. The first question, therefore, in the case is, whether or not there was a delivery of the deed in question.

There is conflict in the testimony between the appellant and his witnesses on one side, and the appellees and their witnesses on the other side; but the facts and circumstances in regard to the execution of the deed on December 22, 1893, as established by the weight of the evidence, are as follows:

On December 22, 1893, appellant and his wife, Catherine Shields, went together to the law office of Lillard & Williams, two practicing lawyers in Bloomington; appellant then and there introduced his wife to Lillard and Williams, and stated that he wanted to deed his farm and his home place in Holder to his wife, reserving a life estate in himself; he also stated that she was a young woman, and would make him a good wife, and he wanted to reward her, and that he had given his children "all he wanted them to have." R. E. Williams, one of the members of the law firm, then wrote the deed, and appellant signed it. The deed was then read over to the appellant, and acknowledged by him before Williams as a notary public. Appellant stated that the deed, which was read to him, was as

he desired to have it. Appellant and Williams then left Mrs. Shields in the office of Lillard & Williams, and went together to the recorder's office, and ⁵⁴⁰ there left the deed for record, the recorder handing appellant a receipt for the deed. Appellant and Williams then returned to the office of Lillard & Williams, where Mrs. Shields awaited appellant, and he and she left the office together. On January 8, 1894, appellant called at the recorder's office for the deed, and surrendered the receipt therefor, and took the deed out of the recorder's office.

As to what occurred in reference to the possession of the deed after it was taken out of the recorder's office by appellant on January 8, 1894, there is much conflict in the testimony. Appellant claims that the deed was in his possession until March, 1898, and the charge is made that it was then taken from appellant's possession in Holder by one of the brothers of Mrs. Shields. We do not think, however, that the contention of the appellant in this regard is sustained by the evidence.

In September, 1894, appellant and his wife went to Kentucky to make a visit to her relatives in that state, and they stayed there about two months. During this visit the deed was produced, and exhibited to and examined by several witnesses. The appellant there stated, in the presence of several witnesses, that he had made a deed of his farm and house and lot to his wife. Upon one occasion he told his wife to go into the house and get the deed, and show it to her father. She brought the deed from the house, and the appellant read it. After it was read she took it and put it in her trunk. The deed was, during that visit, exhibited by the appellant to a witness, who was a lawyer, with a view of satisfying the relatives of Mrs. Shields that the deed was valid. It is shown by the testimony of some four or five witnesses, that the appellant, during that visit, stated that he had already provided for his children by his former wife, and had given what was left, to wit, the farm and the homestead, to his wife, Catherine. When the appellant and his wife, Catherine, were preparing to return from Kentucky ⁵⁴¹ to Illinois after the visit made in September, 1894, she gave the deed to her father, A. G. Bush, and asked him to put it with his papers and take care of it for her. The evidence tends strongly to show that, during that visit, the deed was in her trunk and in her possession. Upon the trial of this case the deed was produced from the possession of A. G. Bush, who stated that he had it in his possession from the fall of 1894 until he produced it upon the trial of this case.

In the spring of 1898 appellant and his wife had made up their minds to leave Illinois, and go to Kentucky to live. At that time they did move from Illinois to Kentucky, and lived there until the day of her death in December, 1898. Previous to their leaving Illinois for Kentucky in 1898 a search was made at the homestead of the appellant for certain documents and papers, but particularly for a certain note-book which he desired to carry away with him. During this search, appellant stated, in answer to an inquiry as to the whereabouts of the deed which he had made to his wife, that he had no other papers in his possession than those which were found upon that search, and that he had "left his and Kitty's papers with Mr. Bush." This statement on the part of appellant, that he had left his wife's papers in Kentucky with Mr. Bush, confirms the statement of Bush, that he had the deed in his possession from 1894 to the time of the trial, and that it was left with him by his daughter, Mrs. Shields.

We are of the opinion, in view of the facts above stated, that there was a delivery of the deed to Mrs. Shields during her lifetime. It is to be noted that Mrs. Shields was present with her husband when he executed the deed, and when he left the office of his lawyers in order to take the deed to the recorder's office to be recorded. Mrs. Shields waited for her husband until he returned from the recorder's office where he had recorded the deed, and, therefore, the record of the deed must ⁵⁴² have been known to her and its recording must have been with her assent. "It is true that the act of recording a deed cannot amount to a delivery and acceptance when there does not appear an assent or knowledge by the grantee of the act": *Herbert v. Herbert*, Breese, 354, 12 Am. Dec. 192; *Wiggins v. Lusk*, 12 Ill. 132; *Himes v. Keighblinger*, 14 Ill. 469. Although the act of recording a deed does not amount to a delivery of the same, yet where it appears that the grantee in the deed has knowledge of the recording of the deed, and has assented to it, and where the recorded deed is subsequently found in the possession of the grantee, such facts amount to prima facie evidence of a delivery: *Thompson v. Dearborn*, 107 Ill. 87; *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68, 11 N. E. 893. No particular form or ceremony is necessary to constitute the delivery of a deed. The delivery may be made "by acts without words, or by words without acts, or by both": *Provart v. Harris*, 150 Ill. 40, 36 N. E. 958. It was said in *Herbert v. Herbert*, Breese, 354, 12

Am. Dec. 192, that the delivery may be "either actual by doing something and saying nothing, or else verbal by saying something and doing nothing, or it may be both; but by one or both of these it must be made, for otherwise, though it be never so well sealed and written, yet is the deed of no force." The very essence of delivery is the intention of the parties. Anything which clearly manifests the intention of the grantor, and the person to whom it is delivered, that the deed shall presently become operative and effectual, and whereby it appears that the grantor loses all control over it, constitutes a sufficient delivery: *Gunnell v. Cockerill*, 79 Ill. 79; *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548; *Benneson v. Aiken*, 102 Ill. 284, 40 Am. Rep. 592. While it is true that declarations of a grantor, made before or subsequent to the execution of his deed, are not admissible for the purpose of impeaching the deed, yet subsequent declarations of the grantor which show that he is satisfied with the deed have been held to be admissible: *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Guild v. Hull*, 127 Ill. 523, 20 N. E. 665. Where the conduct of the grantor, ⁵⁴⁸ and all the circumstances, are such as to indicate that the grantor intended to give effect and operation to the deed, and to relinquish all power and control of it, the law will give effect to the deed accordingly, and will hold that there has been a delivery of the same: *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68, 11 N. E. 893. Where a grantor shows his desire to preserve the deed by placing it upon record, and expresses his satisfaction with it after it has been executed, it will be inferred that he intends to make the instrument effectual by a valid delivery: *Hill v. Hill*, 119 Ill. 242, 10 N. E. 667; *Gunnell v. Cockerill*, 79 Ill. 79. The testimony shows conclusively in this case not only that the deed was recorded with the assent and knowledge of the grantee and, after it was recorded, was found to be in the possession of the grantee, but also that, after its execution, the appellant, the grantor therein, expressed his satisfaction with what he had done and announced that it was his intention thereby to give the property to his wife, subject to his life estate therein.

This deed was in the nature of a voluntary settlement made by the grantor for the benefit of his wife. It is well settled that the presumption of a delivery of a deed is stronger in cases of voluntary settlements than in the case of an ordinary bargain and sale: *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548; *Douglas v. West*, 140 Ill. 455, 31 N. E. 403.

2. The decree of the court below was unquestionably correct in declaring the deed to be null and void, so far as it purported to vest the title to the homestead property in Mrs. Shields. The value of the premises occupied as a homestead did not exceed one thousand dollars, and inasmuch as Mrs. Shields did not unite in the conveyance thereof with her husband, the deed was invalid. Here, also, the possession of the property remained with the appellant, the deed expressly reserving to him a life estate in the property. It has been held by this court that a conveyance of the homestead, not exceeding one thousand dollars in value, by a householder to his wife, where she does not ⁵⁴⁴ join in the conveyance and acknowledge the same, is void and passes no title: *Kitterlin v. Milwaukee Mechanics' Ins. Co.*, 134 Ill. 647, 25 N. E. 772; *Anderson v. Smith*, 159 Ill. 93, 52 N. E. 306; *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129.

3. It is claimed that the decree in this case is erroneous upon the alleged ground that it grants affirmative relief to the defendants upon their answers, and without the filing of a cross-bill. The contention of the appellant is, that the circuit court should have rendered a decree, dismissing the appellant's bill so far as the eighty acres of land were concerned, and that the court, by failing so to dismiss the bill and by rendering a decree holding the title to the eighty acres to be vested in appellant and appellees as heirs of Catherine Shields, deceased, subject to a life estate therein of the appellant, granted affirmative relief upon a simple answer. We do not think that the decree is erroneous in this regard. The doctrine is fully recognized that the defendants in a bill should not be granted affirmative relief upon their answer: *White v. White*, 103 Ill. 438; *Mason v. McGirr*, 28 Ill. 322. It is also true that, in a bill to remove a cloud from the title, a reconveyance from the defendant to the complainant should not be decreed: *Pratt v. Kendig*, 128 Ill. 293, 21 N. E. 495; *Rucker v. Dooley*, 49 Ill. 377, 95 Am. Dec. 614.

But it is well settled that where a bill in chancery contains a general prayer for relief, it must be regarded as sufficient to support any decree warranted by the facts alleged in the bill: *Gunnell v. Cockerill*, 79 Ill. 79; *Stanley v. Valentine*, 79 Ill. 544; *Davidson v. Burke*, 143 Ill. 139, 36 Am. St. Rep. 367, 32 N. E. 514; *Walker v. Converse*, 148 Ill. 622, 36 N. E. 202; *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120. In the case of *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120, we said: "The rule

is, where a bill contains a prayer for special relief and also a prayer for general relief, the complainant may be denied a decree for the relief specially prayed for, and, under the general prayer, be granted such relief as he may be found entitled to have under the allegations of fact made in the bill, and the proof in support thereof."

⁵⁴⁵ In the case at bar the prayer of the bill is that the deed in question "may be declared null and void as against your complainant, and all persons who may hereafter claim by or through him, as a cloud upon your complainant's title, and that the said deed may be delivered up and canceled; and that your complainant may have such other and further relief as equity may require and to your honor may seem meet." The amended bill alleges that Catherine Shields left surviving her husband, James Shields, and her father and brothers and sisters, "being the only heirs at law of Catherine Shields." It also alleges that appellant and his wife occupied the lot and the strip connected therewith as their homestead at the time of the execution of the deed, and "that he and his wife continued to live thereon, and that his wife did not join in the execution of the said deed, and that it was void and conveyed no title." It is also alleged in the bill "that no complete legal title was conveyed to the said Catherine Shields"; and "that the said deed is without any legal effect whatever, though the same may not appear on the face of said deed." The bill also prays "that the said deed be set aside as a cloud upon your complainant's title, and your complainant prays the court that the said deed be revoked and declared null and void, and that the same be delivered up and canceled." The bill was also amended by inserting the allegation, "that, if the court refuses the relief above asked, this complainant prays that the court construe the said deed, and determine whether any title of estate passed by said deed. Complainant further prays that, if the court refuse the relief above asked, the court set aside the said deed 'as to the homestead,' " etc.

Under the prayer of the bill and the allegations made therein as above referred to, the decree was not too broad. It merely construed the deed, and determined what title passed thereby in accordance with the prayer of the bill. Having found that the deed was void as a ⁵⁴⁶ conveyance of the homestead, it proceeded to determine the title as to the farm of eighty acres. As the court could not, under the facts, grant the special prayer for the cancellation of the deed as a conveyance of

the whole of the property, it could only grant the general relief of finding and decreeing the deed void as to the homestead, and of finding and decreeing the deed valid as to the eighty acres. The relief decreed was not upon the answer, but was under the prayer of the bill. The title to the eighty acres was not vested in the appellant and the heirs of his deceased wife by the decree, but it had already been so vested by the deed, and by the law, as applied to the construction of the deed. A court of equity could not, in the performance of its legitimate functions, decree otherwise than it did on the facts of this case.

Accordingly, the decree of the circuit court is affirmed.

DEEDS—DELIVERY.—THE FACT THAT DEEDS ARE RECORDED raises the presumption that they were recorded by the grantee, and is prima facie evidence of delivery: *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676, 58 N. E. 663. No formal delivery is necessary in such cases: *McReynolds v. Grubb*, 150 Mo. 852, 78 Am. St. Rep. 448, 51 S. W. 822.

DEEDS—DELIVERY.—A STRONGER PRESUMPTION prevails in favor of the delivery of a deed in case of a voluntary settlement than in an ordinary case of bargain and sale: *Rodemeler v. Brown*, 169 Ill. 347, 61 Am. St. Rep. 176, 48 N. E. 468.

DEEDS.—WHAT CONSTITUTES DELIVERY of deeds in general is considered in the monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 537-556.

A CONVEYANCE OF A HOMESTEAD NOT ACKNOWLEDGED by the wife is void: *Thompson v. New England Mortgage etc. Co.*, 110 Ala. 400, 55 Am. St. Rep. 29, 18 South. 315. See, too, *Council Bluffs Sav. Bank v. Smith*, 59 Neb. 90, 80 Am. St. Rep. 669, 80 N. W. 270; *Karcher v. Gans*, 18 S. Dak. 883, 79 Am. St. Rep. 898, 83 N. W. 431.

SALEM v. LANE & BODLEY COMPANY.

[189 Ill. 593, 60 N. E. 37.]

MECHANICS' LIENS—LAND PURCHASED BY CITY SUBJECT TO LIEN.—If a contractor has perfected a mechanic's lien against property while owned by an individual, the subsequent purchase of such property by a city does not operate to deprive the lienor of the benefit of statutory provisions for the enforcement of the lien by a forced sale of the property.

MECHANICS' LIENS—WHO ENTITLED TO AS A CONTRACTOR.—One who supplies, under contract with the owner of land, an engine to be placed in an electric light plant, being erected by such owner on the land under a contract with a city to buy the plant and land when the plant is completed, is a contractor, and entitled to the benefit of the mechanic's lien law.

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MECHANICS' LIENS—WHAT INTEREST IN LAND MAY ATTACH TO.—A mechanic's lien for machinery supplied for an electric light plant by contract with the equitable owner of the land attaches to his equitable interest therein, and to the legal title, if he acquires that, and is not divested by a subsequent conveyance of the land and plant to a city.

MECHANICS' LIENS—PLEADING.—It is not essential that a bill to enforce a mechanic's lien, in express terms, denominate complainant therein to be either a contractor or a subcontractor, if the material circumstances of time, place, acts, and other facts necessary to establish the capacity in which arises the right to the relief claimed are plainly alleged.

PLEADING.—A PLEADER IS NOT CONCLUDED by the averment of a legal inference, if such inference is repugnant to the true legal conclusion to be drawn from the state of facts alleged in the same pleading.

MECHANICS' LIENS — ITEMS PROPERLY INCLUDED.—If a contract for an engine provides that a certain sum shall be added to the contract price if the services of an erector are required to set up the engine, such sum for the services, board, and lodging of such erector while engaged in setting up the engine is properly regarded as part of the contract price, for which a mechanic's lien may be filed and enforced.

MECHANICS' LIENS — ITEMS PROPERLY INCLUDED.—A charge for extra shafting specified in a contract for the purchase of an engine, but afterward cut off and rendered valueless by the order of the purchaser, is properly regarded as composing a part of the contract price of the engine, and may be included in a claim for a mechanic's lien.

G. W. Smith and L. M. Kagy, for the appellant.

Van Hoorebeke & Loudon and F. F. Noleman, for the appellee.

596 **BOGGS, C. J.** The circuit court of Marion county granted a decree establishing a lien in virtue of the act of the general assembly entitled "An act to revise the law in relation to mechanics' liens," in force July 1, 1895 (Hurd's Stats. 1899, p. 1104), in favor of the defendant in error corporation against certain premises belonging to the city of Salem, which premises, together with the buildings and machinery thereon, constitute the electric light plant of the said city. This writ of error brings into review the judgment of the appellate court for the fourth district affirming said decree.

The decree was not awarded on the theory the property thus held by the municipality for the use of the public—to enable the city to discharge its public functions—is within the purview of the mechanic's lien law and subject to be sold to discharge an indebtedness contracted by the city for material or labor used in the construction of the plant, but that the lien attached to the electric light plant before it became the prop-

erty of the city, for the debt of the then owners, T. C. Reed and William Van ⁵⁹⁷ Kirk, and that the city acquired the property subject to the lien. Reed and Van Kirk were parties defendant to the bill, and a personal money decree was entered against them and a decree in rem against the electric light plant. The appeal was prosecuted on behalf of the city only. If the defendant in error corporation had perfected a lien against the plant while it was the property of an individual owner, the subsequent purchase of the plant by the city could not operate to deprive the lienor of the benefit of the statutory provisions for the enforcement of the lien by a forced sale of the property. The decree is a personal money decree against Reed and Van Kirk, and for the sale of the electric light plant in default of payment of the decree debt. There is no decree against the city for the payment of any sum. The city cannot be required, by mandamus or any order or process of the court, to pay the decree debt. It is not a decree debtor, but the owner of real property upon which the lien of the decree may operate if it does not pay the sum specified in the decree. It may voluntarily pay the amount necessary to remove the lien from the property, but there is no process or authority of law that may be invoked to coerce it to make payment. The lien is created by the statute, and the statute provides, as the mode of enforcement of the lien, the sale of the land on which the lien has attached. To deny to the plaintiff in error corporation the benefit of this mode of enforcing the decree is, in this case, to nullify the lien.

An investigation of the evidence as preserved in the record has convinced us the chancellor correctly held a lien attached in favor of the defendant in error corporation on the electric light plant while it was the property of said private parties, Reed and Van Kirk, the title being in Reed, and that the city of Salem acquired the property subject to the lien. The material facts are: The firm of T. C. Reed & Co., composed of T. C. Reed and William Van Kirk, on the seventh day of September, 1898, submitted ⁵⁹⁸ a written proposition to the city of Salem to furnish the city a complete electric light plant, in accordance with specifications set out in the proposition, for the sum of nine thousand dollars, to be paid for, if accepted by the city, in whole (if the city desired) in bonds of the city, or in such bonds to the amount of three thousand dollars, and six thousand dollars in six equal annual payments, for which, the proposition provided, the notes of the city were to

be given. The proposition contained the following provision: "It is further stipulated that said city shall have the right to pay any or all of said notes or bonds, or both, at any time the said city shall choose, by paying the face or par value of said notes or bonds, and by paying all interest due at the time they may make such selection. When all of said notes, and interest thereon, are fully paid as herein noted, then said Reed & Co. are to convey, in fee simple and clear of encumbrance, the electric light and power plant herein named, and all of the real estate upon which same may be located, with all pole lines, wire and lamp circuits, of whatsoever kinds and nature, so erected in said city, and all interest whatsoever they may have in any pole lines, wire circuits or lamps which may be erected by said city. Should said city desire to issue the full amount of the city bonds of nine thousand dollars (\$9,000) of five (5) per cent in lieu of issuing the three thousand dollars (\$3,000) of bonds and the six notes, as herein stated, then the said Reed & Co. agree to accept same at once for the purchase of said plant and at once convey all of the aforesaid property to said city." The proposition was formally accepted by the city council. Reed & Co. caused a tract or parcel of land to be purchased from one W. B. Wilson on which to locate the plant. Reed & Co. arranged with one Thomas S. Marshall, a banker of the city of Salem, to supply them with money to enable them, in whole or in part, to carry out the contract with the city, and then caused Wilson to convey the tract or parcel of land to Marshall by deed of date November 7, 1898, and Marshall ⁵⁹⁹ paid the purchase money for the lot to Wilson for Reed & Co. Marshall held the title to secure to him the repayment of money so advanced to Reed & Co., and also to secure their indebtedness to him for any further advances. The title remained in Marshall until the seventeenth day of February, 1899, when he conveyed the premises to T. C. Reed, of said firm of Reed & Co. On the twenty-eighth day of October, 1898, Reed & Co. contracted with the defendant in error company for an engine wherewith to operate the plant, to be paid for upon the completion and acceptance of the plant. The defendant in error company delivered the engine under this contract on the twenty-first day of December, 1898, and it was put in place as part of the machinery of the plant. On the twenty-seventh day of January, 1899, the defendant in error company notified the city council of the plaintiff in error city that it had furnished the engine to Reed & Co., and the

amount due therefor. On the seventeenth day of February, 1899, Marshall conveyed the land upon which the plant had been built to Reed & Co., and they tendered the plant to the city as being complete and in full compliance with the contract. The city on that day inspected the plant, accepted it and elected to pay for it in full in the bonds of the city, issued the bonds and delivered them to Reed, and Reed executed a deed conveying the premises on which the plant stood to the city. The indebtedness to the defendant in error company not being paid, it, within less than four months after the maturity of the demand, filed the bill on which the decree here in question was entered.

The defendant in error was a contractor, within the meaning of that word as used in section 1 of the said lien act, and it was not necessary notice of the lien should be given, as the suit was begun within four months after the final payment of its debt fell due. Such is the provision of section 7 of the act.

When the contract for the engine was made, the title to the premises on which the plant was being constructed ~~was~~ was in Marshall. But he held it only as security for the indebtedness of Reed & Co. to him. The equitable interest and title were in Reed & Co., with whom defendant in error contracted to furnish the engine, and to whom it did furnish it, and the lien attached to that interest. In section 1 of mechanic's lien act (Hurd's Stats. 1899, p. 1105) it is provided: "This lien shall extend to an estate in fee, for life, for years, or any other estate, or any right of redemption, or other interest which such owner may have in the lot or land at the time of making such contract or may subsequently acquire therein, and, as to the improvements for which the lien is claimed, shall be superior to any right of dower of husband or wife in such improvements." Reed, of the firm of Reed & Co., and for the firm, afterward acquired the legal title by deed from Marshall, and the lien attached also to the fee title thus acquired by Reed. Reed subsequently conveyed to the city, but the lien was in no wise impaired by this change of ownership. The city acquired no greater or better title than its grantor had. Nor did the transfer of the title to the city, as we have before seen, divest the defendant in error company of the lien in its favor which attached to and encumbered the lands in the hands of Reed. There was some testimony to prove the city contracted for the land from Wilson, but by far

the greater weight of the proof is adverse to this position. The contract between the city and Reed & Co. did not contemplate the city should be entitled to receive the title to the premises on which the plant was to be built until it had accepted and paid for the plant. If it elected to pay in bonds of the city, the contract provided Reed & Co. should convey the property to the city on delivery of the bonds; but if the city should elect to pay for the plant in part in six notes, due, respectively, in one, two, three, four, five, and six years, the contract expressly provided that Reed & Co. should convey to the city only "when all of said notes, and interest thereon, are fully paid." The ⁶⁰¹ city advanced no money to pay for the land, and an affirmative act of acceptance of the plant and payment thereof, as before mentioned, were prerequisites to the right of the city to demand any right or title to the premises. The substance of the entire transaction was, that Reed & Co. proffered to procure, construct, and tender to the city a complete electric light plant (grounds, building, and machinery), constructed in accordance with given specifications and plans, for a specified sum of money, and the city contracted to accept the said plant (grounds, building, and machinery) if constructed and tendered in accordance with the terms of the proposition of said Reed & Co., and under the contract Reed & Co. tendered, and the city accepted, a plant which was encumbered by a legally subsisting lien in favor of the defendant in error company. Such a lien would not be displaced by the conveyance to the city, but the lien remained as fully effective against the property after the conveyance to the city as before.

Section 1 of the act under which the lien accrued declares in express terms that a person who contracts with the owner of land to furnish material, machinery, etc., to be used in erecting buildings on the land or improving the same, shall be known as a contractor. In the notice placed before the city council by the defendant in error company relative to the demand for the engine, the defendant in error was styled "sub-contractor," and such designation is followed in the bill. The true designation of the defendant in error depends upon the facts bearing upon the contractual relation of the city and Reed & Co. These facts were included in the statement, and were, moreover, well known to the council, and it could not have been misled. The allegations of the bill fully disclosed the facts of the entire transaction much in detail, and that the

defendant in error company was a "contractor" within the meaning of said section 1 is thus demonstrated. It is not essential that the bill for a ⁶⁰² mechanic's lien shall, in express terms, denominate the complainant therein to be either a contractor or a subcontractor, if the material circumstances of time, place, acts, and other facts necessary to establish the capacity in which arises the right to the relief claimed are plainly alleged. The class of lienors to which a complainant belonged is not to be determined from the conclusion of the pleader, but from the facts alleged on which such conclusion rests. When the necessary facts are stated, the legal consequences or conclusions which arise out of the facts need not be stated; nor does the allegation by the one party and the denial by the other, of a mere legal conclusion, raise an issue. A pleader is not concluded by the averment of a legal inference, if such inference is repugnant to the true legal conclusion to be drawn from the state of facts alleged in the same pleadings: 12 Ency. of Pl. & Pr. 1024, 1025.

The total amount for which the lien was established included board, traveling expenses, and time of erector, fifty dollars. It is argued there is no authority in the statute for the establishment of a lien for board and traveling expenses. The contract entered into for the engine provided that if an erector—one skilled in erecting or fitting and putting the engine in place—was required, the sum of fifty dollars should be added to the price to be paid for the engine. Reed & Co. asked, by wire, that an erector be furnished, and an employé of the defendant in error company came to Salem, and was engaged some ten days in fitting and adjusting in place the different parts of the engine. These services, and the expenses connected with their rendition, were properly regarded as composing a part of the contract price of the engine.

There is no force in the complaint that the amount decreed included twelve dollars and fifty cents for shafting not furnished to Reed & Co. and which did not enter into the construction of the plant. The contract for the engine specified the total price to be paid therefor if supplied with shafting ⁶⁰³ of a specified length, and if longer shafting was found to be necessary an additional charge of eight dollars and fifty cents per foot for the shafting should be added to the price for the engine. The defendant in error company was notified it was necessary the shafting should be one and one-half feet longer than was originally contracted for, and it so prepared

the shafting. Subsequently it was discovered the extra length of shafting was not needed, and the defendant in error company was so notified, and directed to cut off the extra one and one-half feet, as it would be in the way, etc. The company complied with the direction and cast the detached end of shafting in the "scrap pile," it being valueless, unless it should be as old iron. The charge for this extra shafting was properly allowed as composing a part of the cost of the engine.

The judgment of the appellate court is correct, and is affirmed.

MECHANICS' LIENS ATTACH TO WHATEVER INTEREST the owner had when the work was begun, and to another and greater interest whenever acquired before the lien is enforced: *Jarvis v. State Bank*, 22 Colo. 399, 55 Am. St. Rep. 129, 45 Pac. 505. Such liens on an equitable estate attach to an after-acquired legal title the moment it vests in the same person: *Lyon v. McGuffey*, 4 Pa. St. 126, 45 Am. Dec. 675.

MECHANIC'S LIEN.—A PURCHASER OF PROPERTY against which a mechanic's lien may be asserted may be required to pay such lien: *Conlee v. Clark*, 14 Ind. App. 205, 56 Am. St. Rep. 298, 42 N. E. 762.

MECHANICS' LIENS AGAINST PUBLIC BUILDINGS cannot, in general, be enforced: *Noonan v. Hastings*, 101 Ky. 812, 72 Am. St. Rep. 419, and note, 41 S. W. 82.

CASES
IN THE
SUPREME COURT
OF
IOWA.

STATE v. SANTER.

[111 Iowa, 1, 82 N. W. 445.]

MONOPOLY—WHEN MAY BE GRANTED.—Exclusive privileges and franchises may be granted when absolutely necessary to insure safety to the people, but not otherwise.

POLICE POWER—MONOPOLY.—THE LEGISLATURE cannot, under the guise of the police power, create a monopoly.

CONSTITUTIONAL LAW—SPECIAL PRIVILEGES—GAS LAMPS.—A statute providing for the use of gas manufactured from petroleum, which requires a person to use a particular lamp, naming it, when others equally safe are in the market, is invalid as violating a provision of the constitution prohibiting the legislature from granting "to any citizen or class of citizens privileges or immunities, which upon the same terms shall not equally belong to all citizens."

CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—It is only where the language of a statute will bear two constructions that a court is justified in applying a rule that will sustain the act, rather than one which will defeat it; but this rule of construction cannot be used for the purpose of adding to or taking from the plainly expressed language of the legislature.

CONSTITUTIONAL LAW—ACT VOID IN PART.—An act void in part is not necessarily void in toto, and if sufficient remains to effect its object without the aid of the invalid portion, the latter only will be rejected.

CONSTITUTIONAL LAW—ACT VOID IN PART—USE OF PETROLEUM.—A statute, the general purpose of which is to prohibit the use of the lighter products of petroleum for illuminating purposes, and which is capable of enforcement without reference to an exception contained therein, is not rendered invalid in its entirety by reason of the unconstitutionality of the exception.

Milton Remley, attorney general, for the state.

Thomas F. Stevenson and Cummins, Hewitt & Wright, for the appellee.

² DEEMER, J. The material part of the statute under which defendant was prosecuted reads as follows: "If any ³ person sell or offer for sale or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of not less than one hundred and five degrees standard—Fahrenheit thermometer, closed test, except that the gas or vapor thereof shall be generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum when used in the Welsbach hydrocarbon incandescent lamp—he shall be punished," etc.: Code, sec. 2508. It is agreed that the defendant used gasoline of a quality that would emit a combustible vapor at temperature of less than one hundred and five degrees for illuminating purposes, that the vapor was not generated in closed reservoirs outside the building, and that he did not use it in Welsbach hydrocarbon incandescent burners. It is further agreed that the lamp used by the defendant was constructed on the same principle as the Welsbach, though not manufactured by the same company, and that it was constructed substantially as the Welsbach; that results were reached in substantially the same way, and by the same means; and that the lamps were the mechanical equivalent of each other. The attorney general contends that the exception or proviso found in the statute as to the character of lamp to be used in the use of the lighter products of petroleum means that the lamp must be the identical one therein referred to, and that defendant is guilty, on the admitted facts. He further contends that even if the proviso be found to be unconstitutional, as creating a monopoly, still the defendant is guilty, under the conceded facts, for the reason that, if the proviso be eliminated, then defendant had no right to use gasoline for illuminating purposes unless the vapor is generated outside the building that is to be lighted, while the defendant contends that the proviso in question relates, not to the Welsbach lamp, by name, but to any lamp constructed on the same general principles, and accomplishing the same general results with equal safety to ⁴ the public; that, if this be not true, the proviso is unconstitutional, and, if unconstitutional, then the whole act must fall; and that there is no prohibition against the use of the lighter products of petroleum. If the proviso does refer to a specific lamp by name, it is undoubtedly unconstitutional, as obnoxious to article 1, section 6, of the constitution of Iowa, which provides that "the general assembly shall not grant to any citizen or class of citizens privileges or immunities, which

upon the same terms shall not equally belong to all citizens." Special privileges and monopolies are always obnoxious, and discriminations against persons or classes still more so. The constitution of the United States forbids legislation by the states that shall abridge the privileges or immunities of the citizens of the United States, or deny to any persons within their jurisdiction the equal protection of the laws. If the attorney general's contention as to the proper construction of the words found in the proviso under consideration be correct, it is clear that such provision violates both the federal and state constitutions: *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Mugler v. Kansas*, 123 U. S. 661, 8 Sup. Ct. Rep. 273. Exclusive privileges and franchises may, no doubt, be granted, when absolutely necessary to insure safety to the people but not otherwise: See *Slaughter-House Cases*, 16 Wall. 36. In this case the parties agree, however, that there are other lamps, operated on the same general principle as the Welsbach, that are equally safe, and that secure the same results. This being true, the legislature has no power to select one and reject the other. To do so would be to create the most odious of monopolies. The statute under consideration was enacted in virtue of the police power of the state, but the legislature cannot under this guise create a monopoly: *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064; *State v. Cincinnati etc. Coke Co.*, 18 Ohio St. 262; *Mayor etc. v. Thorne*, 7 Paige, 261; ⁵ *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19. The business of manufacturing lamps, or the use of gas or vapor for illuminating purposes, is not unusual, and does not depend primarily on governmental permission. Defendant would have the right to use any lamp and kind of gas or vapor he chose for the purposes of lighting his building, in the absence of some police regulation imposed by the legislature; and a law that required him to use a particular lamp, when others equally safe were in the market, would be a violation of his constitutional rights and would also give to the manufacturer special privileges over others producing equally meritorious lamps. If the state had bestowed a right on defendant, the prosecution of which was not a common, natural right, it might create a monopoly in this right; for with the abolition of the monopoly thus created would disappear all right to carry on the trade: *Cooley on Torts*, 77, 278. These views in no manner conflict with the rules announced in *Des Moines St. R. Co. v. Des Moines etc. Ry. Co.*, 73 Iowa, 513, 33 N. W. 610, 35 N. W. 602. There a mere privi-

lege was granted by a city in the use of its streets. No question of natural right was involved. In the grant of special privileges, no doubt, a monopoly may be created without violating the constitutional inhibition. Do the words contained in the statute, "the Welsbach hydrocarbon incandescent lamp," mean that particular lamp, or a lamp constructed on the same general principles, and reaching results in substantially the same manner? In construing the language of an act that is claimed to be unconstitutional, that interpretation will be adopted, if possible, which will not render it obnoxious to the constitution. But courts may not by construction import words into an act, nor make a statute read otherwise than as the legislature intended. In order to arrive at the legislative intent, a rule of construction is provided by code, section 48, paragraph 2, which reads as follows: "Words and phrases shall be construed according to the context and the approved usages of the language. The * technical words and phrases and such other words as may have acquired a peculiar and appropriate meaning in law shall be construed according to such meaning." In the stipulation of facts it is agreed that there is a lamp known to the trade as the "Welsbach Hydrocarbon Incandescent Lamp," and that there is another lamp, not so known, but constructed on the same general principles, and reaching results in substantially the same manner. Viewing the language of the statute in the light of these facts, it seems clear that the legislature had in mind the lamp known as the "Welsbach Hydrocarbon Incandescent," and not some other lamp, although operated on the same principle. To hold otherwise would be to import into the language used some other words, and give it an effect that was evidently not intended by the legislature. It does not appear how many lamps operated on the same general principles as the Welsbach were in existence when the act in question was passed, but the reasonable inference from the agreed statement of facts is that there was at least one other kind known to the trade. To avoid holding a statute unconstitutional, we are not warranted in forcing on its language a meaning which, upon a fair test, is repugnant to its terms: *French v. Teschemaker*, 24 Cal. 518; *Bigelow v. West Wisconsin Ry. Co.*, 27 Wis. 478. It is only where the language of the act will bear two constructions that a court is justified in applying a rule that will sustain the act, rather than one which will defeat it. There is no room for interpretation when the language used is plain and admits of but one meaning. Consideration of the preceding acts of

the legislature gives emphasis to the thought that the legislature, in passing the law in question, had reference to a particular lamp and not to a principle. By section 8 of chapter 185 of the acts of the twentieth general assembly, no person was permitted to use the lighter products of petroleum for illuminating purposes, "provided that nothing in this act should be so construed as to prevent the use of machines or generators ⁷ constructed on the same principle of the Davy safety lamp." This same language was carried into the proposed revision of the laws recommended by the code commission: See pages 507, 508, of their proposed code. For some reason the legislature did not adopt their recommendation, but, on the contrary, struck out the principle of a certain appliance, and specifically named the lamp by which the lighter products of petroleum might be burned. This, in connection with the language used, is convincing evidence that a particular lamp, rather than a principle, was referred to. There is nothing to indicate a contrary view, save the rule of construction to which we have heretofore referred. But this rule of construction cannot be used for the purpose of adding to or taking from the plainly expressed language of the legislature: *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. Rep. 651. None of the cases cited by appellee are in conflict with these rules. Without exception, those cases relate to acts that were susceptible of two constructions, one of which would render them obnoxious to the constitution, and the other in harmony with it. The latter construction was, of course, adopted. Here there is no room for construction, for the language is as clear as words can make it.

2. Finding, as we do, that the exception contained in the act is unconstitutional, the next inquiry is, What effect does this holding have on the act as a whole? Does it destroy it in toto, or does the act remain, with the exception expunged? "It has been held to be sound construction of a statute that one section thereof is void and others valid, yet, if it evidently appears that one section is compensation or inducement for another, and the connection between them is such as to warrant the belief that the valid part would not have been passed alone, then the whole should be void": *Dubuque v. Chicago etc. R. Co.*, 47 Iowa, 196; *Slauson v. Racine*, 13 Wis. 398. Again, it has been held that an act void in part is not necessarily ⁸ void in toto. If sufficient remains to effect its object without the aid of the invalid portion, the latter only shall be rejected,

and the former will stand: *Warren v. Mayor etc.*, 2 Gray, 84; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 962; *Santo v. State*, 2 Iowa, 205, 63 Am. Dec. 487; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Huntington v. Worthen*, 120 U. S. 97, 7 Sup. Ct. Rep. 469; *Commonwealth v. Kimball*, 24 Pick. 361, 35 Am. Dec. 326; *Clark v. Ellis*, 2 Blackf. 10. Some courts have said that, if an unconstitutional clause of a statute cannot be rejected without affecting the intent of the legislature, the whole statute must fall (*Pollock v. Farmers' etc. Trust Co.*, 157 U. S. 429, 15 Sup. Ct. Rep. 673; *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 580; *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. Rep. 988), and that the two parts must be capable of separation, so that each may be read by itself, else the unconstitutional part will carry with it that which is constitutional. With these rules in mind, we turn now to the statute in question, and find that the legislature, in virtue of its police power, prohibited the use of the lighter products of petroleum for illuminating purposes, for all purposes whatever. Two exceptions to the general rule of prohibition are contained in the act, one of which is clearly valid, and the other is invalid. Is it likely that it would have passed an act containing the general prohibition, independent of this invalid exception? The two parts of the act are not dependent in terms. In other words, they may be separated, and the first may stand and is complete in itself without reference to the exception. If the act is to be declared null and void because of the unconstitutional provision, it must be on the theory that the act would not have passed, except as an entirety, and that the general purpose of the legislature will be defeated if the general prohibition be held valid and the exception invalid. To solve this question, we should look to the history of the enactment. The fourteenth general assembly passed an act prohibiting the sale of the lighter ⁹ products of petroleum, without exception: See chapter 47. This act was carried into the code of 1873 as section 3901. The seventeenth general assembly amended this law, and provided for the appointment of inspectors: See chapter 172. But the selling of the lighter products of petroleum was prohibited, without exception. The twentieth general assembly also amended the law by prohibiting the sale or use of the lighter products of petroleum for illuminating purposes, but introduced two exceptions—one permitting the use of such products when generated outside of the building, in closed reservoirs, and the other permitting the use

of machines or generators constructed on the principle of Davy's safety lamp: See chapter 185. So far, there is no right to use the lighter products of petroleum when the gas or vapor is generated in the building, unless, perhaps, it be in machines constructed on the principle of Davy's safety lamp. The exception now found in the statute that we hold contrary to the constitution was introduced by the general assembly that passed the code. From this hasty review of the different statutes, it will be observed that the general intent of the legislature was to prohibit the use of the lighter products of petroleum for illuminating purposes. That it had the power to pass a law which would accomplish this end there can be no doubt, and that such was its intent is equally clear. It will not do to say, therefore, that it would not have passed the act in question without the exception. To so assume would be to say that it intended to permit the sale or use of the lighter products of petroleum without let or hindrance. Such construction would be contrary to legislative policy existing for more than twenty-five years. The exceptions introduced into the acts from time to time do not indicate that the legislature intended to repeal pre-existing laws in the event these exceptions were held invalid. They were not the inducement that led to the passage of the general prohibitory laws. On the contrary, they were permissions granted under certain conditions, and, if these provisions proved ineffectual, ¹⁰ there is no ground for saying that the whole act was destroyed. The general prohibition was capable of enforcement, without reference to the exception, and the invalidity of the exception does not destroy the entire act. As sustaining our conclusions, see *Allen v. Louisiana*, 103 U. S. 80; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495; *Willard v. People*, 5 Ill. 461; *Eells v. People*, 5 Ill. 498; *Santo v. State*, 2 Iowa, 205, 63 Am. Dec. 487; *Tiernan v. Rinker*, 102 U. S. 123; *State v. Amery*, 12 R. I. 64.

We are of opinion that the defendant is not using the lamp authorized by law, and that if the exception found in the statute is unconstitutional, as it clearly is, still there is a general prohibition against the use of lighter products of petroleum for illuminating purposes when the gas or vapor thereof is generated inside the buildings to be lighted, and that, under the agreed statement of facts, defendant was guilty. While we cannot, by reversing the case, in any manner affect the status of the defendant, yet in order that a correct rule of law may be es-

tablished, we are constrained to disagree with the learned trial judge, and his order directing a verdict is reversed.

CONSTITUTIONALITY OF STATUTES.—IF SUSCEPTIBLE OF TWO MEANINGS, that one must be adopted, though the less plausible, which reconciles a statute to the constitution, rather than another which makes it in conflict therewith: *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033.

PART OF A STATUTE MAY BE VOID and another part valid: Note to *Noel v. People*, 79 Am. St. Rep. 246.

SPECIAL PRIVILEGES.—THE POWER OF LEGISLATURES to grant special privileges is considered in *Perkins v. Heert*, 158 N. Y. 306, 70 Am. St. Rep. 483, 53 N. E. 18; *Noel v. People*, 187 Ill. 587, 79 Am. St. Rep. 238, 58 N. E. 616; *State v. Garbroski*, 111 Iowa, 496, post, p. 524, 82 N. W. 959.

SCHOONOVER v. OSBORNE.

[111 Iowa, 140, 82 N. W. 505.]

ATTACHMENT UPON LAND—WHEN VALID.—The levy of an attachment upon real estate, to be valid, must be evidenced by a return of service of the writ, signed by the officer.

ATTACHMENT UPON LAND—NECESSITY OF NOTICE.—Notice of an attachment upon land is not necessary to render the attachment valid, but is required only to complete the levy, and the levy is effectual if the notice is given within a reasonable time.

ATTACHMENT UPON LAND—MORTGAGE—PRIORITIES. Where the fact of making the levy of an attachment upon land is indorsed on the writ of attachment, but notice thereof is not given to the defendant until a reasonable time thereafter, the lien of the attachment accrues at the date of the indorsement, and is superior to the lien of a mortgage upon the same land given by the defendant subsequently to the attachment but before notice thereof is given.

Sheehan & McCarn, M. W. Herrick, F. O. Ellison, and J. W. Doxsee, for the appellants.

Milton Remley and Ercanbrack & Lawrence, for the appellees.

¹⁴¹ **LADD, J.** In the afternoon of August 6, 1896, David Osborne executed to his daughters, Ella F. and Adella D. Osborne, a mortgage on five hundred and sixteen acres of land, then in his name, to secure an alleged indebtedness to them of ten thousand three hundred and thirty-four dollars and seventy-five cents. This mortgage was filed for record on the same day

at 7:25 o'clock P. M. It described the land as in range 86, instead of 85, and on the following day another mortgage, making the proper correction, was signed and recorded. David Osborne also confessed judgment in favor of G. W. and G. L. Lovell on the afternoon of August 7, 1896, for the sum of five hundred and twenty-five dollars and forty-five cents. Prior to these transactions, however, and on the fifth day of the same month, at 7:45 o'clock P. M., the writ of attachment, issued ¹⁴² in the main case of Schoonover v. Osborne, 108 Iowa, 453, 79 N. W. 263, was placed in the hands of the sheriff. That officer at once made the proper entry in the encumbrance-book, reciting the fact of the levy, and indorsed the following return on the back of the writ:

"State of Iowa, }
Jones County. } ss.

"This is to certify that this writ came into my hands on the fifth day of August, 1896, at 7:45 o'clock P. M. I served the same in Jones county, Iowa, by attaching the following described property as the property of Lewis D. Osborne and David Osborne, defendants herein, to wit: [Here the real estate is described.]

P. O. BABCOCK,

"Sheriff of Jones County, Iowa."

Notice of the levy was served on David Osborne, August 10, 1896, and the return thereof indorsed on the writ some days later.

1. When did the lien created by the levy of the writ attach to the real estate? A levy on land, as there can be no seizure, must, of necessity, be almost, if not entirely, symbolical. The mere determination in the mind of the officer, however, is not enough, unless evidenced by some unequivocal act clearly indicating his intention of appropriating or singling out certain real estate for the satisfaction of the debt. There is some diversity of opinion as to what this shall be. Going upon the land, as such an act is not notorious, and no visible marks are left, would seem a useless ceremony; and for this reason the better considered cases hold that, in the absence of statutory provisions, a levy may be made in the sheriff's office without even seeing it. Mr. Shinn, in his work on Attachments and Garnishments, section 214, says: "It is not necessary, even as against a bona fide purchaser, that the officer should take actual notice of the property, nor that he should go near it, nor see it, but he must do

some act, make some entry or memorandum indicative of his intention; and when he has done this, with a fixed purpose in his mind, he has made a legal levy. Simply making a return that he has attached is sufficient": To the same effect, see, ¹⁴² also, Drake on Attachments, sec. 236; Freeman on Executions, sec. 280; 8 Ency. of Pl. & Pr. 557. In Hammel v. Queen's Ins. Co., 54 Wis. 72, 41 Am. Rep. 1, 11 N. W. 349, the court declared a levy on land to be impossible; while in Perrin v. Leverett, 13 Mass. 129, and Lynch v. Earle, 18 R. I. 531, 28 Atl. 763, the mental process of levying the writ seems to have been thought enough. In the latter case the court, speaking through Tillinghast, J., concluded: "The statute, then, failing to require the doing of any particular act or thing by the sheriff in order to constitute a levy of the execution, and this proceeding being one which is entirely regulated by statute, the subjecting of real property to satisfy debts being unknown to the common law, we see no reason why he may not go through with the mere mental process of levying an execution in Foster or Burrillville, while sitting in his office in Providence, and at the same time comply with said statutory requirement. The usual and safer mode of levying an execution on real estate doubtless is to indorse on the execution a statement to the effect that it is levied, describing the estate, and noting on the execution the date and time of day of the levy; but this is done mainly for the purpose of aiding the memory of the officer when he comes to make his return thereon. At any rate, it is clearly not essential to the making of the levy, as it can be as effectually done after as at the time when the officer decides to make said levy." In Vroman v. Thompson, 51 Mich. 452, 16 N. W. 810, the court, in holding that causing notice of levy to be recorded as required by statute was sufficient, said: "He [appellant] insists that no levy upon land is legally possible, unless a memorandum of the fact is indorsed on the execution. That the officer must attest the intellectual act of levying by a written memorial of some kind cannot be denied. So much is fairly implied. But it is not admitted that the visible evidence required can only exist in the form of an indorsement on ¹⁴⁴ this writ. The statute does not require it, and there is nothing in the nature of the thing demanding it. The object is to have some outward and permanent manifestation of the fact—something which is durable, intelligible, and public, in the nature of a record, to which all may resort who are entitled to information and desire it. The necessity is for evidence which is plain

and accessible, and this is well afforded by the recorded notice prescribed by the statute." The supreme court of Colorado reached a similar conclusion in *Raynolds v. Ray*, 12 Colo. 108, 20 Pac. 5. We are precluded by former decisions of this court from announcing the rule as broadly as was done in these authorities. In *Collier v. French*, 64 Iowa, 577, 21 N. W. 90, *Sioux Valley State Bank v. Kellogg*, 81 Iowa, 124, 46 N. W. 859, and *First Nat. Bank v. Jasper County Bank*, 71 Iowa, 486, 32 N. W. 400, the entry in the encumbrance-book was held to form no part of the levy. And in the last case the court declared that a levy on real estate, to be valid, must be evidenced by a return of service on the writ, signed by the officer. Only by this signature can the sheriff attest his acts. It was there said: "At least, the sheriff should have made returns on the writs which would have given notice to the world of the levies." The word "returns" evidently refers to the indorsement of the sheriff. As already remarked, the levy on real estate must of necessity be a paper levy, and the unequivocal act, prior to the adoption of the code, indicating it, was the indorsement of the sheriff on the writ showing it. Such was the decision in *First Nat. Bank v. Jasper Co. Bank*, 71 Iowa, 486, 32 N. W. 400, and it is well sustained by authority: *Isam v. Hooks*, 46 Ga. 309; *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358; *Crosby v. Allyn*, 5 Me. 453; *Perrin v. Leverett*, 13 Mass. 128; *Bland v. Whitfield*, 46 N. C. 125; *Hancock v. Henderson*, 45 Tex. 479; *Sanger v. Trammell*, 66 Tex. 361, 1 S. W. 378; *Fenno v. Coulter*, 14 Ark. 43; *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736.

2. The appellant asserts that, under the statute, the service of notice on the defendant was an essential part of ¹⁴⁵ the levy, without which no lien attached. That portion material to our inquiry may be set out: "Stock or interest owned by the defendant in any company, and also debts due him, or property of his held by third persons, may be attached, and the mode of attachment must be as follows: 1. By giving the defendant in the action, if found within the county, and also the person occupying or in possession of the property, if it be in the hands of a third person, notice of attachment": Code 1873, sec. 2967. This necessarily presupposes something to have been done—i. e., the writ of attachment to have been served. That was our conclusion in *Hamilton v. Hartinger*, 96 Iowa, 12, 64 N. W. 593, where the court, speaking through Given, J., said: "The notice required is 'notice of attachment.' We have

seen that in this case written 'notice of attachment' and of the levy upon the real estate was given to the defendant. If 'notice of attachment' means simply notice of its issuance, then defendant had the written notice required, but if it means also notice of the levy, then he did not have the written notice of the levy on said personal property. We think the notice contemplated is of the levy, and therefore the levy upon said personal property was not valid, because no written notice of said levy was given to the defendant." Having so construed the statute with reference to personality, a similar construction logically follows when applied to land. If notice is required only to complete a levy on chattels, as was held in *Citizens' Nat. Bank v. Converse*, 101 Iowa, 310, 70 N. W. 201, then it can serve no other purpose, in event of a levy on real estate. In that case, Robinson, J., speaking for the court, said: "In many cases, it is impossible to notify the defendant at the moment his property is seized under the writ. He may be in a distant part of the county, and his whereabouts may be unknown, and it cannot have been the legislative intent that in such case the attaching creditor acquires no rights, until notice of the levy is served, which are valid against subsequent ¹⁴⁶ creditors or grantees. We cannot conceive of any reason for such an interpretation of the statute, unless required by the language used. That does not state that the levy creates no right until notice thereof is given to the defendant, but that 'notice of attachment must be given.' In the absence of a more specific designation of the time when it must be given, it will be sufficient if given within a reasonable time, to be determined from all the circumstances of the case, and the levy will be effectual as a lien until the expiration of that time." Nor has notice ever been held in this state essential to make a levy on land. In *Sioux Valley State Bank v. Kellogg*, 81 Iowa, 124, 46 N. W. 859, and in *Anderson v. Moline Plow Co.*, 101 Iowa, 747, 63 Am. St. Rep. 424, 69 N. W. 1028, the levy was invalid because never completed by service on the defendants. The same rule pertains to levies on personal property: *Hamilton v. Hartinger*, 96 Iowa, 12, 64 N. W. 592; *Commercial Nat. Bank v. Farmers' etc. Nat. Bank*, 82 Iowa, 192, 47 N. W. 1080. In the last case notice to the officers of a corporation was adjudged essential to a levy on stock in a company. This was because of an express provision of the statute that such stocks be attached "by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof," of the

fact. This apprises those in charge of the transfer-books of what has been done, and, as valid transfers of stock may not be made as against third parties save on such books, operates as constructive notice: *Moore v. Marshalltown Opera-House Co.*, 81 Iowa, 46, 46 N. W. 750. It serves the same office in a levy on such intangible property as possession does in the case of ordinary personalty or entry on the encumbrance-book in the attachment of realty; the design in making a levy being that something be done to carry notice to third parties for their protection. The law, in requiring notice to be served on the defendant in the action, can have no other purpose than that of enabling him in apt time to guard any interests he may have in the property attached. If so, then there is no reason for construing it a part of the levy, and thereby putting it in ¹⁴⁷ the power of the debtor, by sale or the execution of a mortgage, to defeat the attaching creditor, however diligent.

3. We conclude that the lien attached when the sheriff indorsed the fact of making the levy on the writ of attachment; that the service of notice on David Osborne was only essential in order to complete the levy; and that this might be made within a reasonable time after such indorsement. The sheriff did not find him at his home, some distance from the county seat, the day after the levy, and did not serve notice on him until five days after it was made. The same promptness in giving notice of a levy on real estate is not demanded as of that on personalty. Delay will seldom occasion expense to the debtor, while costs are continually accumulating when personal property is held. There was no change whatever in the situation of Osborne or of the intervenors, and, under the circumstances disclosed, service must be held to have been made within a reasonable time: See *Schoonover v. Osborne*, 108 Iowa, 453, 79 N. W. 268. The sheriff has other duties to perform and reasonable promptness in dispatching business, not exacted instantaneously, is all that should be insisted upon. The ruling was right, and the decree is affirmed.

ATTACHMENT ON LAND.—On the necessity of notice to the defendant where real estate is attached, see *Gilman v. Thompson*, 11 Vt. 643, 34 Am. Dec. 714; *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; *Barber v. Morris*, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559; note to *Baker v. Aultman*, 73 Am. St. Rep. 134. It is not requisite to the validity of an attachment on real estate that the officer should go upon the land. The lien acquired on the property dates from the time the officer indorses the levy on the writ: *Riordan v. Britton*, 69

Tex. 198, 5 Am. St. Rep. 37, 7 S. W. 50. See, further, on the sufficiency of the levy, *Baker v. Aultman*, 107 Ga. 339, 73 Am. St. Rep. 132, 33 S. E. 423.

ATTACHMENT—NECESSITY OF RETURN.—A sheriff cannot justify the seizure of goods under a writ that he has failed to return into court: *Williams v. Babbitt*, 14 Gray, 141, 74 Am. Dec. 670.

EASTON v. SOMERVILLE.

[111 Iowa, 164, 82 N. W. 475.]

APPEAL—POINT FIRST RAISED ON—MISJOINDER—ELECTION.—An objection that there is a misjoinder of parties or of causes of action, or that the plaintiff has elected to pursue a particular remedy, cannot be raised for the first time on appeal.

GUARDIAN AND WARD—ELECTION OF REMEDIES.—An action by a guardian against the executor of his ward's former guardian and one who has received trust funds belonging to the ward, for the conversion of such funds, does not constitute an election of remedies against either of the defendants, since the remedies are not inconsistent.

APPEAL—OBJECTION FIRST RAISED ON.—The objection that a suit is not properly brought should be raised by motion or demurrer, and cannot be first raised on appeal.

STATUTE OF LIMITATIONS—ESTATES OF DECEDENTS—PLEADING.—In a suit against the estate of a decedent, the bar of the statute of limitations should be pleaded, in order to be available as a defense.

STATUTE OF LIMITATIONS—WARD'S CLAIM AGAINST GUARDIAN'S ESTATE.—A statute requiring claims against an estate to be presented within a certain time does not apply to the claim of an infant ward against the estate of her guardian, where the claim arises out of an unauthorized investment of the ward's property, since such claim is contingent upon the ward's rejection of the investment upon becoming of age, and may never ripen into a legal claim against the guardian's estate.

STATUTE OF LIMITATIONS—CLAIMS AGAINST ESTATE OF DECEDENT.—A statute of limitations requiring claims against an estate to be filed within a specified time, begins to run from the giving of notice by the executor, and where no proof is offered that such notice was given, it cannot be presumed that a claim is barred.

GUARDIAN AND WARD—INVESTMENT OF FUNDS.—Under the statutes of Iowa a guardian cannot loan the money of his ward, lease his land, or invest his funds without an order of court, and an investment made without an order of the probate court is voidable until approved by the proper court.

GUARDIAN AND WARD—RECOVERY OF WARD'S ESTATE—LACHES.—A delay of three years is not such laches as will estop the guardian of an infant ward from recovering the ward's property from the estate of her former guardian, where the decedent's estate is solvent, no prejudice has resulted by reason of the delay, and there has been no change in the relations of the parties.

GUARDIAN AND WARD—RECOVERY OF WARD'S ESTATE—ESTOPPEL.—The guardian of an infant ward is not estopped from suing to recover his ward's property which had been improperly invested by her former guardian, where in the meantime the position of the defendants has not been changed, and they have done no act that would result in their injury if the guardian should recover, and where the guardian had not, after acquiring knowledge of the facts, done any act tending to show an intent to ratify the transaction.

ELECTION TO RATIFY TRANSACTION—EFFECT OF DELAY.—To constitute an election there must be knowledge of the facts and some decisive act tending to show an intent to ratify the transaction. Mere delay is not conclusive evidence of an election.

GUARDIAN AND WARD—LIABILITY OF GUARDIAN—LACHES IN RECOVERING PROPERTY.—Mere delay on the part of a guardian in bringing an action to recover his ward's property does not give the ward a right of action against him, where no damage has resulted and a collectible judgment is eventually recovered.

J. C. Kerr, for the appellant Richards.

E. A. Walton, for the appellant Somerville.

M. R. & J. B. McCrary, for the appellant Alice Knox.

B. B. Foster and Stevenson & Lavender, for the appellee.

¹⁶⁷ **DEEMER, J.** Alice M. Knox is the adopted child of Charles H. and Sarah J. Knox. Her stepfather died in the year 1890, and her stepmother, Sarah J. Knox, was appointed guardian of her estate. In the year 1893 this guardian had the sum of eighteen hundred and fifty-one dollars in her hands, belonging to her ward. In March of that year she, without authority or direction from the probate court, purchased from defendant Richards a note for the sum of one thousand dollars, secured by mortgage on some Dakota land, that had been ¹⁶⁸ made to Richards by some parties named Moench. The note was indorsed to Sarah J. Knox as guardian. Mrs. Knox did not report her purchase to the probate court, as we understand it; but, if she did, her report was not approved. On February 4, 1894, Mrs. Knox died, and on April 26th of that year defendant John Somerville was appointed executor of her last will and testament. About February 10, 1894, plaintiff was appointed guardian of the person and property of Alice M. Knox, to succeed Mrs. Knox. Shortly thereafter he demanded and received from the executor, Somerville, the Moench note and mortgage, and included it in his inventory of property belonging to his ward. He also received eighty dollars in interest thereon from defendant Richards, which he reported to the

court. He also redeemed the land covered by the mortgage from tax sale; but as soon as he learned there had been no order of the court authorizing the investment of his ward's funds in the mortgage, he immediately collected the amount paid out in redemption from tax sale from the mortgagors, with interest. Alice M. Knox attained her majority June 17, 1896, and on October 15, 1897, plaintiff filed what he called his "final report," in which he referred to the Moench mortgage, and certain cash items received by him, amounting in all to fifteen hundred and eighty dollars, as all the property and money coming into his hands belonging to his ward. In December of that year the ward filed objections to the report. Two supplemental reports were filed by the guardian. The court made an order that the guardian collect and bring into court, in cash, the funds belonging to his ward, at the October, 1897, term of court; and on December 13, 1897, plaintiff filed his petition in this case, in which he seeks to recover from Richards and Somerville, executor, the amount of money belonging to his ward that was invested by Mrs. Knox, as guardian, in the Moench mortgage; claiming that the former guardian had converted that amount of her estate, and that Richards had received the same, knowing it ¹⁰⁰ was trust funds, and that he should account therefor. He tenders the note and mortgage to defendants, and asks judgment for the amount converted, with interest. By agreement of counsel, and with permission of the court, Alice M. Knox intervened, asking an accounting from her two guardians, and seeking to charge plaintiff with neglect and carelessness in the management of her property. The objections of Alice M. Knox to the reports of her guardian, Easton, were, by consent of parties, also brought into the case, to be considered and determined on the evidence adduced. Defendant Somerville, executor, denied the allegations of plaintiff's petition, but admitted he held, for the benefit of Alice M. Knox, certain sums bequeathed to her by the will of Sarah J. Knox. He also pleaded laches and negligence on the part of plaintiff, and an estoppel based on plaintiff's conduct with reference to the Moench mortgage. Defendant Richards denied the allegations of the petition, and also pleaded laches, negligence, and estoppel. In answer to the petition of intervention, various pleadings were filed that need not at this time be referred to. Plaintiff, in answer, however, admitted having two hundred and ninety-two dollars and ninety cents in cash belonging to his ward, subject to deductions for expenses, etc., but denied all negligence in the

management of her estate. The trial court, as we have stated, rendered judgment against defendants for the amount of money invested by Mrs. Knox, as guardian, in the Moench mortgage, with interest, less the sum of eighty dollars found to have been paid by Richards. It also found that plaintiff had in his hands a balance of one hundred and fifty-seven dollars and ninety-two cents belonging to his ward, which amount he was ordered to turn over to the clerk of the court for her benefit. It also found that the estate of Mrs. Knox was indebted to Alice M. Knox in the sum of four hundred and fifteen dollars and eighty cents, money in her hands at the time of her death, belonging to her said ward; and judgment for the amount was ordered ¹⁷⁰ against Somerville, as executor, and he was ordered to pay the same to Alice M. Knox. All parties save plaintiff appeal.

Some preliminary questions will be settled before going to the main points: Somerville contends that there is a misjoinder of parties and of causes of action. This point does not seem to have been made in the court below, and consequently cannot be considered on appeal: *Hines v. Horner*, 86 Iowa, 594, 53 N. W. 317; *Miller v. Keokuk etc. Ry. Co.*, 63 Iowa, 680, 16 N. W. 567. Again, he argues that, by pursuing Richards, plaintiff elected his remedy, and cannot pursue the executor. This also seems to be presented for the first time in this court. There is no issue that justifies any such contention. Moreover, plaintiff asked judgment against both defendants for the conversion of the funds belonging to his ward; and as the remedies against the receiver of the funds and the guardian, who unlawfully converted them, are not inconsistent, there was no election of either rights or remedies: *Kearney Milling etc. Co. v. Union Pac. Ry. Co.*, 97 Iowa, 719, 59 Am. St. Rep. 434, 66 N. W. 1059. It is also contended that the district court had no jurisdiction of a cause of action or claim against one deceased; that it should have been presented to the probate court. That question was not made in the trial court by motion or otherwise. The action was before the right judge, and in the right court, but the claim or petition was not entitled as in probate. The district court had jurisdiction. Defendant's remedy was by motion, or perhaps by demurrer; and, as he failed to exercise it, he cannot complain: *Bank v. Green*, 59 Iowa, 171, 13 N. W. 75; *Goodnow v. Wells*, 67 Iowa, 654, 25 N. W. 864; *Clough v. Ide*, 107 Iowa, 669, 78 N. W. 697. A suit in equity was the proper remedy, in the absence of objections on the part of the executor: *Toledo Sav. Bank v. Johnston*, 94 Iowa,

212, 62 N. W. 748; *In re Allgier*, 65 Cal. 228, 3 Pac. 849. Further, it is argued that the claim against the estate of Sarah Knox is barred by the statute of limitations relating to claims against estates. ¹⁷¹ If this defense had been pleaded, there would be much force in the argument. But it was not. The executor appeared by counsel, and filed voluminous pleadings, setting forth his various defenses, but at no place does he plead the statutory bar. In view of the manner in which the case was tried, it seems that such a pleading was necessary, if reliance was placed on such defense. Again, it may be well doubted whether the statute relating to the time of filing claims has any application to the case. The investing of the money in the Moench mortgage without the authority of and direction of the court was, as we shall see, merely voidable. The ward, on arriving at age, might have elected to accept the mortgage. Had she done so, there would have been no liability on the part of the first guardian or of her estate. The claim then was, in a sense at least, contingent, and did not mature during the life of the first guardian. In such cases the statute does not apply: *Savery v. Sypher*, 39 Iowa, 675; *Wickham v. Hull*, 102 Iowa, 469, 71 N. W. 352; *Senat v. Findley*, 51 Iowa, 20, 50 N. W. 575. Moreover, the ward was not a creditor of Mrs. Knox. The relation of debtor and creditor did not exist between them until the minor became of age: *Humphreys v. Mattoon*, 43 Iowa, 556; *Thomas v. Pyne*, 55 Iowa, 348, 7 N. W. 576. Easton was not appointed guardian until after the death of Mrs. Knox, and he held no claim against her at the time of her death, and it may well be doubted whether the statute applies to him: See *In re Allgier*, 65 Cal. 228, 3 Pac. 849. The estate of Sarah J. Knox is solvent and unsettled, and no prejudice can result from the allowance of the claims of plaintiff and his ward. But concede that the statute relating to the filing of claims does apply, and that it is not necessary to plead the statute; still it does not appear that the claim is barred. The statute began to run from the giving of notice by the executor. No evidence was adduced of the giving of such notice. True, we have an amended abstract, reciting that a certain proof of notice was filed in probate, but it does not appear ¹⁷² that this was offered in evidence on the trial of the case. Judicial notice will not be taken of the fact that such a notice was given, and, in the absence of proof as to when the notice was given, we cannot say the claim is barred: *Johnson v. Barker*, 57 Iowa, 32, 10 N. W. 289; *Stewart v. Phenice*, 65 Iowa, 475, 22 N. W.

636; McLeary v. Doran, 79 Iowa, 213, 44 N. W. 360; Pickering v. Weiting, 47 Iowa, 242. Brownell v. Williams, 54 Iowa, 353, 6 N. W. 530, is not in point. There evidence as to the giving of notice was introduced and considered by the court. In some states it is held that the statute does not begin to run until final settlement and an order to pay over is made: Marlow v. Lacy, 68 Tex. 154, 2 S. W. 52. It is doubtful, however, if this is the rule in this state: Wycoff v. Michael, 95 Iowa, 559, 64 N. W. 608. Our conclusions on this branch of the case find some support in the following cases: Robinson v. Robinson, 22 Iowa, 427; MacGregor v. MacGregor, 9 Iowa, 65; Cassidy v. Casey, 58 Iowa, 326, 12 N. W. 286; Sankey v. Cook, 82 Iowa, 126, 47 N. W. 1077; Moore v. McKinley, 60 Iowa, 367, 14 N. W. 768.

2. A guardian cannot, as at common law, loan his ward's money, or invest it in securities, without an order of court. His powers are conferred by statute, and he may loan their money, and in all other respects manage their affairs, under proper orders of the court, or a judge thereof: Code, sec. 3200. Under this section it has been held that a guardian cannot loan the money of his ward, lease his land, or invest his funds, without an order of court: Bates v. Dunham, 58 Iowa, 308, 12 N. W. 309; McReynolds v. Anderson, 69 Iowa, 208, 28 N. W. 558; Slusher v. Hammond, 94 Iowa, 512, 63 N. W. 185; Reed v. Lane, 96 Iowa, 454, 65 N. W. 380; Garner v. Hendry, 95 Iowa, 44, 63 N. W. 359; Alexander v. Buffington, 66 Iowa, 360, 23 N. W. 823; Dohms v. Mann, 76 Iowa, 724, 39 N. W. 823. Such transactions made without the order or direction of the probate court are invalid, or voidable, at least, until approved by the proper court. As the investment in the Moench mortgage was not done on the order of the probate court, and as the same has never been approved, the estate of Sarah J. Knox is liable for the ¹⁷⁸ amount of the funds so invested: Garner v. Hendry, 95 Iowa, 44, 63 N. W. 359. Although there is a dispute in the evidence, we are satisfied that the defendant Richards knew when he disposed of the mortgage that he was selling it to Mrs. Knox as guardian, and that he received money belonging to her ward in payment thereof. He is presumed to have known that the guardian had no authority to make the purchase, and, under the circumstances, must be held to hold the money received in trust for the benefit of the ward: Bates v. Dunham, 58 Iowa, 308, 12 N. W. 309. But Richards and Somerville both plead that plaintiff, by his laches and conduct, is estopped from enforcing

his claim. When plaintiff received the Moench note and mortgage from defendant Somerville, as executor, he had no actual knowledge of the fact that they had been purchased without the order of the probate court. Acting on the assumption that the proceedings were regular, he undertook to redeem the land from tax sale as heretofore stated, and also received from defendant Richards one installment of interest on the mortgage. As soon as he learned of the fact that the mortgage had been taken without authority, he demanded and received from the mortgagors the amount paid out by him in redemption, and within a short time commenced this action to rescind the investment, and recover the money advanced to Richards by the former guardian. He did not, however, tender the eighty dollars received from Richards, but the court deducted that amount from the sum found due the plaintiff. Defendants do not plead an election. Their defense is laches and estoppel. There was no such delay after plaintiff learned of the facts as to bar him of relief. If it be said that he was bound to take notice of the transaction of his predecessor, still there was no such delay as should bar plaintiff of his right to recover. No prejudice resulted to either defendant by reason of the delay. The delay was but little more than three years, and there has been no such change in the relations of the parties as will bar plaintiff of relief. Again, we are not prepared to say that ¹⁷⁴ plaintiff could not wait until the ward became of age, to know whether or not she would ratify the transaction before bringing his suit to set it aside. But, however this may be, we do not think the defense of laches is established. One of the essential elements of an estoppel is that the party pleading it should have so acted with reference to the conduct or representations of the other as that he would suffer damage if the one who is sought to be barred thereby were permitted to deny the truth thereof: *Byer v. Healy*, 84 Iowa, 7, 50 N. W. 70; *Tufts v. McClure*, 40 Iowa, 317; *Jamison v. Miller*, 64 Iowa, 402, 20 N. W. 491; *Wishard v. McNeill*, 85 Iowa, 474, 52 N. W. 484. There is no evidence whatever that either of the defendants have in any manner changed position, or done anything that would result in injury or damage if plaintiff is permitted to recover. If election were pleaded, or if it be treated as embraced in the plea of estoppel, yet we think the defense is not made out. To constitute an election, there must be knowledge of the facts, and some decisive act tending to show an intent to ratify the transaction, rather than to disapprove it.

There is no evidence that plaintiff did anything, after knowledge of the facts under which the investment was made, and evinced an election to ratify. On the contrary, he disaffirmed it, so far as he could, and commenced this action. Without knowledge, there could be no election; and, while delay may be evidence of election, it is not conclusive. As to what constitutes an election, see *Richards v. Schriber, Conchar & Westphal Co.*, 98 Iowa, 422, 67 N. W. 569; *Kearney Milling etc. Co. v. Union Pac. Ry. Co.*, 97 Iowa, 719, 59 Am. St. Rep. 434, 66 N. W. 1059. As between plaintiff and his ward, it may be that he cannot be heard to say that he had no knowledge of the circumstances under which the investment was made; for it was his duty, as her guardian, to protect her interests. But as to these defendants no such obligation existed. They were wrongdoers and cannot be heard to say that plaintiff made an election, unless it appears that what he did, which ¹⁷⁵ is said to be evidence of an intent to approve the investment, was done with knowledge of the facts. As plaintiff sues in a representative capacity, and can do no act binding his ward's estate without authority from the probate court, there is much reason for saying that he could not make an election that would be binding on his ward: See *Cassedy v. Casey*, 58 Iowa, 326, 12 N. W. 286; *Lee v. Marion Sav. Bank*, 108 Iowa, 716, 78 N. W. 692; *Hippee v. Pond*, 77 Iowa, 235, 42 N. W. 192. But, without deciding this point, we think it clear that no estoppel is proven. Moreover, there is no evidence that the note and mortgage are of any less value now than they were when purchased by Mrs. Knox. The investment of the money in redemption from tax sale has been fully accounted for, and the payment of the eighty dollars in interest was made by Richards, and he (Richards) has had the full benefit thereof in the decree. No especial point is made on the failure of plaintiff to return or to offer to return the eighty dollars interest payment, and, as that matter is fully protected by the decree, there is no just cause for complaint. Defendant Richards is not in position to insist on a return of the money before the commencement of suit. In paying the eighty dollars he was doing no more than the law required: *Hendrickson v. Hendrickson*, 51 Iowa, 68, 50 N. W. 287; *Allerton v. Allerton*, 50 N. Y. 670; *Triggs v. Jones*, 46 Minn. 277, 38 N. W. 1113. The note and mortgage were delivered to the clerk of the court for the use and benefit of defendant Richards, and his rights thereto were fully protected.

3. Alice M. Knox also appeals from the decree. The allowance made to her has already been stated. Had plaintiff, as her guardian, invested her money in the Moench mortgage, there can be no doubt that she would be entitled to judgment against him for the amount thereof. As he did not do so, his responsibility is for failure to take the necessary steps to protect her interests. That he did not bring suit against defendants as soon as he ¹⁷⁶ ought may, for the purposes of the case, be conceded; but has the delay resulted in injury to his ward? His delay did not amount to a conversion of the property, and his liability must be predicated on negligence. Mere laches do not give the ward a right of action, unless damage results. The plaintiff now has judgment against defendants for the amount of the mortgage investment, with interest, and there is no suggestion that the judgment is not good. Had plaintiff proceeded, immediately on his appointment, to collect, he would have obtained no more than he has—a judgment that seems to be good. If the judgment were uncollectible, a different question would arise. No complaint is made of the judgment in favor of intervenor against the estate of Sarah J. Knox, and for the amount thereof plaintiff should have credit. Intervenor also has judgment against plaintiff for the sum of one hundred and fifty-seven dollars and ninety-two cents. This was arrived at after an accounting made by the guardian, in which he was allowed certain credits for amounts paid the ward, or for her benefit, amounting to something over seven hundred dollars. He was also allowed one hundred dollars for services, and as compensation for his attorneys. The total amount allowed the intervenor is something over two thousand six hundred dollars. This is more than eighteen hundred dollars received by her original guardian, with six per cent interest thereon, and intervenor has no cause for complaint. It is proper to say that the executor makes no complaint of the form of judgment entered against him, and we therefore express no opinion as to the validity thereof. The decree seems to be right, under the issues, and it is affirmed.

APPEAL.—CONTENTIONS NOT MADE IN THE COURT below cannot be considered on appeal: *Parrish v. Mahany*, 12 S. Dak. 278, 76 Am. St. Rep. 604, 81 N. W. 295; *Lamar Canal Co. v. Amity Land etc. Co.*, 26 Colo. 370, 77 Am. St. Rep. 261, 58 Pac. 600.

THE STATUTE OF LIMITATIONS MUST BE PLEADED in order to be available: *Gilbert v. Hewetson*, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655. The effect of the failure of a personal representative to plead the statute when sued on a debt is considered

in Estate of Claghorn, 181 Pa. St. 600, 59 Am. St. Rep. 680, 37 Atl. 918.

RATIFICATION OF A TRANSACTION must be with full knowledge: Bierman v. City Mills Co., 151 N. Y. 482, 56 Am. St. Rep. 635, 45 N. E. 856; and mere delay in making an election, where others are not affected thereby, does not amount to a ratification: American Freehold Land etc. Co. v. Dykes, 111 Ala. 178, 56 Am. St. Rep. 38, 18 South. 292.

CENTRAL STATE BANK v. SPURLIN.

[111 Iowa, 187, 82 N. W. 493.]

BILLS AND NOTES—PAYABLE TO “TRUSTEE”—NEGOTIABILITY.—A promissory note payable to a named person, “trustee,” is not rendered non-negotiable by the use of the word “trustee,” such suffix being merely descriptio personae.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—NOTICE OF FRAUD.—One who purchases a promissory note in the usual course of business, before maturity, and for full value, without notice of any infirmity, is a bona fide holder thereof, and the mere fact that he was negligent in making inquiries in regard to the note is not sufficient to charge him with notice that the note was obtained by fraud.

W. J. Moir and John Porter, for the appellant.

Albrook & Lundy and William B. Brown, for the appellee.

188 WATERMAN, J. The note sued on is in the following form:

“\$250.00. Marshalltown, Iowa, May 27, 1896.

“Twelve months after date, for value received, I promise to pay to J. M. Fitzgerald, trustee, or order, two hundred and fifty dollars, payable at Marshalltown Bank, with interest at six per cent per annum, payable annually, six per cent on interest due, if action is commenced hereon, a reasonable attorneys’ fees, and hereby consent that any justice of the peace may have jurisdiction on this note.

(Signed) “S. R. SPURLIN.”

The pivotal question to be determined is, Was this note negotiable? When a conclusion is reached upon this point, all of the other matters argued can be disposed of readily. The claim is that the payee of the note was not certain; that the word “trustee,” following his name, makes it evident that some person other than Fitzgerald was interested in the note,

as payee, and because of this the negotiability of the instrument was destroyed. If the word "trustee" is to be construed as mere matter of description, then Fitzgerald would have a right of action on it in his own name, and its negotiability would not be affected. Mr. Daniel, in his work on Negotiable Instruments, volume 1, section 415, says: "If a note be payable to an individual, with the mere suffix of his official character, such suffix will be regarded as *descriptio personae*, and the individual is the payee." This is universally admitted with relation to such words as "agent," "president," and "executor." As to the title "cashier," commercial usage has so altered the rule that the bank may sue thereon, and its possession of the note will, alone, be sufficient evidence of title: 1 Daniel on Negotiable Instruments, sec. 1189. For some reason that to us does not seem quite clear, the authorities are not altogether in harmony as to the effect when ¹⁸⁹ the word "trustee" is added to the payee's name. The use of the suffix "agent" or "executor" indicates, as well as the word "trustee," that some person other than the named payee is equitably interested in the proceeds of the note. So this reason is not sufficient for holding that negotiability is destroyed, and no other has been advanced or occurs to us. In a well-considered case the court of appeals of Tennessee, after noting the conflict of authority, thus concludes: "We take it, the decided weight of authority, and, it seems to us, of sound reason, supports the position that the addition of the word 'trustee' to the name of the payee of a note does not destroy its negotiability": *Fox v. Citizens' etc. Trust Co.*, 37 S. W. 1102. See, also, *Bush v. Packard*, 3 Harr. (Del.) 385; *Downer v. Read*, 17 Minn. 493 (Gil. 470); *Binney v. Plumley*, 5 Vt. 500, 26 Am. Dec. 313; *Pierce v. Robie*, 39 Me. 205, 63 Am. Dec. 614. We are quite content to follow these holdings. The case of *Gordon v. Anderson*, 83 Iowa, 224, 32 Am. St. Rep. 302, 49 N. W. 86, cited and relied upon by appellant, is not in conflict with this principle. In that case the note was made payable to "Charles R. Whitesell et al." The payee there was undoubtedly rendered uncertain, for by its terms the legal title to the note was vested in others, unnamed, jointly with Whitesell.

2. This instrument was, for the reasons given, negotiable. The undisputed evidence shows that it was purchased by plaintiff bank in the usual course of business, before due, without notice of any infirmity, and that full value was paid therefor. It was shown that the bank made some inquiry as to the paper

before purchasing. The claim is made that, had it inquired further, it would have learned that the note was obtained by fraud, and was without consideration. Without saying that the evidence does not show the bank to have been diligent in this respect, the rule is that mere negligence on the part of the purchaser is not sufficient to charge him with notice: *Lehman v. Press*, 106 Iowa, 389, 76 N. W. 818, and cases cited.

¹⁹⁰ The uncontradicted evidence thus showing that plaintiff was a bona fide holder, the defenses offered could not be urged against it. The trial court would have been justified at the close of the testimony in ordering a verdict for plaintiff. This being true, we need not consider the many criticisms of the charge of the trial court, for the errors committed, if any, were without prejudice.

Affirmed.

Effect of Writings in Favor of "Trustee" but not Indicating the Beneficiary or the Terms of the Trust.

The principal instruments in which situations of this character have arisen are promissory notes and checks, corporate stock and other securities, wills, deeds, mortgages, and books showing deposits in a bank.

It is an elementary rule that to create a trust, the trust instrument should show both a beneficiary and an intention to create a trust, and the absence of a definite beneficiary is, as a general rule, a fatal objection to an attempt to create a valid trust; *Wilcox v. Gilchrist*, 85 Hun. 1, 32 N. Y. Supp. 608; *Fosdick v. Hempstead*, 125 N. Y. 581, 26 N. E. 801; *Levy v. Levy*, 33 N. Y. 107; *Holland v. Alcock*, 108 N. Y. 812, 2 Am. St. Rep. 420, 16 N. E. 305; *Gilman v. McArdle*, 99 N. Y. 451, 52 Am. Rep. 41, 2 N. E. 464. Hence, if an instrument in favor of a "trustee" fails to designate any beneficiary or the terms of the trust, no trust will be deemed to be created by the terms of the instrument itself. This will be more fully seen later on. It does not follow from this, however, that no trust can be established and enforced, simply because this particular instrument is ineffective to create a trust. So far as personal property or choses in action are concerned, a trust may be established in them by parol. Hence it does not follow that an instrument in favor of a "trustee" as to such property will convey any absolute individual and beneficial rights to such trustee. Indeed, the contrary is true, and the unnamed beneficiary may enforce his rights against the trustee: *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. But the instrument itself does not create a trust.

In the case of real property, in which kind of property an express trust cannot be created otherwise than by a writing, an instrument to a "trustee" will not create a trust where no beneficiary

is named and no intent to create a trust is expressed. But even in such a case, a resulting or constructive trust may be created by operation of law, so that the trustee will not take a beneficial interest in himself: *Dillaye v. Greenough*, 45 N. Y. 438. A trust may be established by a contemporaneous written instrument aside from the mere writing in favor of the trustee: See *Owens v. Owens*, 23 N. J. Eq. 60. But we are not here concerned, primarily, with the question as to how and when a trust may be established and enforced when the writing in favor of the "trustee" fails to declare the trust and neglects to name the beneficiary. We are concerned with the effect of the instrument itself which fails to fully declare the trust. Suffice to say that an instrument in favor of a "trustee," which contains no other language to indicate the terms of the trust or who is the beneficiary, is not a sufficient declaration of trust.

Effect of Note or Check Payable to "Trustee."—Where one executes a promissory note and signs it by his individual name, either preceded or followed by the word "trustee," such word is a mere word of description, and the note is the individual obligation of the one who signs it: *Fowler v. Atkinson*, 6 Minn. 578; *Township No. 11 v. Weir*, 9 Ind. 224. Such a note is prima facie the individual note of the signer, on which he is personally liable: *Bingham v. Stewart*, 13 Minn. 106; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Vliet v. Simanton*, 63 N. J. L. 458, 43 Atl. 738. If the signature at the end of the note is limited by words in the body of the note indicating that the note is made by the signers as trustees and not as individuals, and disclaiming all personal liability, then the note is not the mere personal obligation of the signers: *Shoe etc. Nat. Bank v. Dix*, 123 Mass. 148, 25 Am. Rep. 49.

Where the drawer of a check signs his name, followed by the word "trustee," this gives notice to one who receives it that the funds may not be the property of the drawer personally, but it is not sufficient notice that the trust is of such a character that the trustee is limited to "legal investments," so as to render the receiver liable as for a spoliation of the trust estate, if the check is used for other investments. The doctrine of notice does not extend this far: *Isham v. Post*, 71 Hun, 184, 23 N. Y. Supp. 211, 1168.

The weight of authority supports the principal case in holding that the addition of the word "trustee," following the name of the payee in a note, does not destroy its negotiability. So far as the negotiability of the note is concerned such a word is merely *descriptio personae*: See *Bush v. Peckard*, 3 Harr. (Del.) 385; *Fox v. Citizens' Bank (Tenn.)*, 37 S. W. 1102; *Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830, 42 S. W. 149. The opinion in *Third Nat. Bank v. Lange*, 51 Md. 138, 84 Am. Rep. 304, seems to imply a contrary holding, the court saying that a note payable to the order of the payee, "trustee," restricts its free circulation, and does not come within the class of paper known as commercial paper.

The word "trustee" is merely a word of description, also, so far as the payee's liability as indorser is concerned, where the note is made payable to him, "trustee," and he has indorsed it in the same manner. His personal liability as indorser is not limited by the use of the word "trustee" after his name: *Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830, 42 S. W. 149.

In other respects, however, the addition of the word "trustee" to the name of the payee amounts to something more than a mere word of description. It is obvious that if the word "trustee" is nothing more than a description of the person, it is mere surplusage and may be rejected as a nullity. But that it is something more than this, so far as giving notice to a subsequent holder of the note as to its character is concerned, the authorities are agreed. It has been expressly decided that the use of the word "trustee" in a note imports the existence of a trust, and gives notice to all into whose hands the instrument may subsequently come that the note is held by the payee in trust, and not as his own individually: *Galloway v. Gleason*, 61 Mo. App. 21; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Turner v. Hoyle*, 95 Mo. 337, 8 S. W. 157; *Jackson v. Davis*, McA. & M. 334; *Sturtevant v. Jaques*, 14 Allen, 523; *Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304; *Alexander v. Alderson*, 7 Baxt. 403. Having notice that the payee holds a note as "trustee," it is the duty of a purchaser to make inquiry concerning the note as to the power of the trustee relative thereto. And while the use of the word "trustee" is not in itself sufficient to establish the right of a beneficiary to the note: *Westmoreland v. Foster*, 60 Ala. 448; yet this does not relieve a purchaser from the obligation of making inquiry concerning the note. To what extent a purchaser must make inquiry, and how far mere notice of a trust affects his rights, have been the occasion of some slight difference of opinion. Certainly, the mere notice given by the bare word "trustee" is sufficient to prevent a purchaser from taking such note in payment of the private debt of the payee, unless, of course, there is in fact no trusteeship. But a trustee has no authority to transfer trust funds in payment of his private debt, and an attempt to do so constitutes an illegal diversion of the trust property, and if the taker of such property has notice of its trust character he will be held liable to the beneficiary. Hence if a payee in a note, who is designated as trustee, is in fact a trustee, one who takes the note in payment of a personal obligation of the payee is affected with notice of the trust and liable to the beneficiary for the conversion of the note: *Turner v. Hoyle*, 95 Mo. 337, 8 S. W. 157; *Galloway v. Gleason*, 61 Mo. App. 21; *Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304; *Alexander v. Alderson*, 7 Baxt. 403. Any transfer of trust property in payment of a private debt is so far beyond the ordinary scope of the powers of a trustee that it is a suspicious circumstance imposing upon

the creditor the duty to inquire as to the authority of the trustee to transfer the property: *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. In *Jackson v. Davis*, McA. & M. 334, the court held that a purchaser of promissory notes, executed to trustees and indorsed by them as such, was affected with notice of the trust to such an extent that he must see to the proper application of the purchase money. Such an extreme ruling places too great a burden on purchasers of notes and lacks judicial support elsewhere. So far as this rule is applied to the application of the purchase money to the payee's personal debt to the purchaser, it is undoubtedly correct. But ordinarily the only inquiry a purchaser of such a note, is required to make is to ascertain the right of the payee to dispose of it: See *Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304; *Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830, 42 S. W. 149. In this last case the rule was said to be: "That he who takes a security from a trustee, with his fiduciary character displayed upon its face, is bound to inquire as to his right to dispose of it, but if, on inquiry, it is found that there is no restriction upon the trustee's power of disposition, or there is nothing in the nature of the transaction to indicate any abuse of his trust, then the title of a purchaser in good faith, for value and before maturity, will be protected."

The payee of a promissory note named therein as trustee may sue thereon in his own name, even though the beneficiary is dead: *Beck v. Haas*, 81 Mo. App. 180. See *Ingersoll v. Cooper*, 5 Blackf. 426.

Corporate Stock and Securities in the Name of a Trustee occupy a position similar to promissory notes payable to a trustee, so far as concerns notice to purchasers and pledgees of the trust character of the holding, and their rights and duties growing out of such notice. In *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, the court said that "the law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry for the reason that a trust is frequently simulated or pretended when it really does not exist." Hence, it was held that a pledgee of stock, standing in the name of one as trustee, is by the mere terms of the certificate put upon inquiry as to the character of the trust and its limitations, and if he accepts the stock as a pledge for the security of the trustee's personal debt, he does so at his peril. This case does not in terms apply to anything but a pledge of securities, but the same rule would seem to clearly apply to a purchaser of securities from a trustee. The rule and its limits as stated by Perry on Trusts, section 225, and quoted with approval by the court in *Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830, 42 S. W. 149, is this: "The mere fact that the word 'trustee' is on the face of the securities cannot put a purchaser to any inquiry be-

yond ascertaining whether the trustee has power to vary the securities. If he has such power, a purchaser in good faith will be protected, although the trustee use the money for his private purposes. But if a purchaser takes securities from a trustee, with the word 'trustee' upon their face, in payment of a private debt due from the trustee, the sale may be avoided by the cestui que trust, or the purchaser may be held as a trustee." This, we believe, is a correct statement of the rule governing the rights of purchasers and pledgees who take securities which stand in the name of a trustee: See, also, *Duncan v. Jandon*, 15 Wall. 165. And the same notice of the trust character of securities is imputed to, and the same duty to make inquiries is required of, the corporation on whose books the certificates of stock stand in the name of a trustee, when the trustee attempts to transfer the stock. The corporation must make inquiries as to the power of the trustee so as to protect the trust property in its hands from misappropriation by the trustee: *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648.

In *Albert v. Savings Bank*, 2 Md. 159, the court of appeals of Maryland reached a conclusion opposed to that which we have just stated, and held that the mere designation of the holders of stock as trustees, without any further specification of the trust or of the beneficiaries gave no notice either to the corporation or a purchaser that the stock was trust property, so as to render them liable for a misappropriation of the property. This case in its broad statement of the doctrine of notice to, and liability of, a purchaser of stock standing in the name of a trustee, has not been followed by the later Maryland cases, as we understand them. So far as the precise facts of the case are concerned—that is, as relates to the liability of a municipal corporation for an unauthorized transfer of its stock held by one as trustee—the case seems not to have been overruled: See *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648; *Graffin v. Robb*, 84 Md. 451, 35 Atl. 971. Yet these same cases do require a purchaser of stock to exercise reasonable care to ascertain the power of a trustee over stock which stands in his name, and whether he is acting within the limits of such power, although no arbitrary rule has been established as to what constitutes reasonable care. In that state, each case seems to stand on its own facts. The word "trustee" alone does not in every case constitute notice to a purchaser that the trustee is committing a breach of trust.

The mere use of the word "trustee" in the assignment of a mortgage imports the existence of a trust, and gives notice thereof to any person into whose hands the instrument subsequently comes: *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

Effect of Gift in a Will to "Trustee."—A devise or bequest to executors or others in trust, or as trustees, gives them no beneficial

interest in the property. And if it is clear that the testator intended them to take no beneficial interest in the property, they will hold the property as trustees, although it does not appear from the face of the will who the beneficiaries are or what are the terms of the trust. Ordinarily, in such a case the donee will hold the property in trust for the heirs or next of kin: See *Read v. Steadman*, 26 Beav. 495; *Langham v. Sanford*, 19 Ves. 641; *Morice v. Bishop of Durham*, 9 Ves. 399; *Gross v. Moore*, 68 Hun, 412; 22 N. Y. Supp. 1019. It must clearly appear that a trust is intended, and if it does so appear the donee will not take a beneficial interest, even though it does not appear who the real beneficiary is: *Briggs v. Penny*, 3 Macn. & G. 546. If the gift is simply for the donee to apply as he might see fit, and there was no secret promise on his part to apply it in a certain manner, the donee could apply the gift solely to his own use: *Amherst College v. Ritch*, 151 N. Y. 282, 822, 45 N. E. 876. And where the donee is both trustee and beneficiary, he will become the absolute owner of the property: *Hahn v. Hutchinson*, 159 Pa. St. 133, 28 Atl. 167.

Two questions have arisen in connection with gifts to a donee in trust, where the beneficiary is not named. The first is, What is the effect, if the testator subsequently to making his will makes a written direction as to the disposition of the property given to the trustee by his will, but such writing is not executed in the manner required by the statute relating to wills, and the "trustee" had no knowledge of the direction until after the testator's death, when the paper was found among the testator's effects? In such a case it seems to be clear that the subsequent writing does not create a valid trust, and the legatee will hold the property as trustee for the next of kin: See *Boyes v. Carritt*, 26 Ch. Div. 531; *In re Fleetwood*, 15 Ch. Div. 594; *Boson v. Statham*, 1 Eden, 508; *Johnson v. Ball*, 5 De Gex & S. 85.

The second question is, If the devise is to one as trustee, no beneficiary being named, can parol evidence be introduced to establish a trust in favor of the beneficiary intended by the testator, or in such a case is the devisee a trustee for the heirs or next of kin? Most of the cases which have arisen in which a secret trust has been enforced have been cases in which the devise was in form absolute, and no trust appeared on the face of the will, but the gift was so made under a promise, express or implied, on the part of the legatee that he would apply the gift to a certain purpose or dispose of it to a certain person: See *Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876; *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53; *De Laurencel v. De Boom*, 48 Cal. 581; *Church v. Ruland*, 64 Pa. St. 442; *Doud v. Tucker*, 41 Conn. 197; *In re Boyes*, 26 Ch. Div. 531. The secret trust in such a case will be enforced. The trust springs from the intention of the testator and the promise of the legatee. "The rule," said the court in *Am-*

herst College v. Ritch, 151 N. Y. 282, 45 N. E. 876, "is founded on the principle that the legacy would not have been given, or intestacy allowed to ensue, unless the promise had been made, and hence the person promising is bound in equity to keep it, as to violate it would be fraud." It would seem that the same principles would control if the will on its face showed that the devisee held the property as trustee. If the devise in such a case is given on the strength of a promise on the part of the devisee that he will dispose of the property in a certain manner, it would certainly be equally fraudulent for him to refuse to perform his promise, and on this ground the intended beneficiary should be allowed to enforce the trust in his favor. This view has been adopted by several English cases, notably Riordan v. Banon, 10 I. R. Eq. 469, In re Fleetwood, 15 Ch. Div. 594, and Crook v. Brooking, 2 Vern. 50. In the first of these cases the vice-chancellor said that the rule that secret trusts not disclosed by a will would be enforced "appears to me to apply to cases where the will shows that some trust was intended, as well as to those where this does not appear upon it. The testator, at least when his purpose is communicated to and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise. No doubt the fraud would be of a different kind if he could by means of it retain the benefit of the legacy for himself; but it appears that it would also be a fraud though the result would be to defeat the expressed intention for the benefit of the heir, next of kin, or residuary donees." This case was approved and followed in In re Fleetwood, 15 Ch. Div. 594, where after an elaborate review of the authorities the court held there was no distinction between the case of a trust undisclosed by the will and one where the donee was mentioned as trustee without any further indication of the terms of the trust or as to who were to be the beneficiaries. It would, therefore, seem to be settled that if a will makes a gift to one as trustee, the trust may be enforced though its terms do not appear on the face of the will or the beneficiary is not disclosed, if the terms and conditions of the trust have been communicated to the devisee or legatee during the lifetime of the testator and he should accept the particular trust: See In re Fleetwood, 15 Ch. Div. 594; Riordan v. Banon, 10 I. R. Eq. 469; In re Boyes, 26 Ch. Div. 531. But a testator cannot by his will reserve the right to subsequently dispose of his property either by parol, or by a writing not executed in accordance with the statute of wills: Riordan v. Banon, 10 I. R. Eq. 469. And a testator cannot, by calling a legatee or devisee a trustee, impose upon him a trust which he does not communicate to him, and which he attempts to declare by a subsequent instrument not executed in the form prescribed for wills. In such a case the devisee or legatee will

hold the gift to himself as trustee for the heirs or next of kin: *In re Boyes*, 26 Ch. Div. 531.

Effect of Deposit in Bank to "Trustee."—As between a bank and one who deposits money therein as trustee, the depositor is the owner of the deposit. There being nothing on the face of the deposit to indicate who the beneficiary is, the money in the bank is the property of the depositor: See *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554; *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 17 Am. St. Rep. 779, 18 Atl. 632. Such trustee, being the owner of the deposit as against the bank, is entitled to draw against the account by check. Indeed, the contract of the bank in such a case is that it will pay but the money deposited on the checks of the depositor, and where the checks are drawn in proper form the bank is bound to presume that they are drawn by the trustee in the proper discharge of his duty, and must accordingly honor the check: *State Nat. Bank v. Reilly*, 124 Ill. 464, 14 N. E. 657; *Freeholders of Essex v. Newark Nat Bank*, 48 N. J. Eq. 51, 21 Atl. 185; *National Bank v. Insurance Co.*, 104 U. S. 54. The bank has a right to assume that the trustee will appropriate the money to the proper uses of the trust, and is ordinarily discharged from liability if it pays the money to the trustee who deposited it: *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554. The mere depositing of money in a bank as trustee confers no right on a beneficiary to such deposit. The legal title to the deposit and the right to draw the money still remains with the depositor: *Brabrook v. Boston etc. Bank*, 104 Mass. 228, 6 Am. Rep. 222. The designation of a depositor as trustee is not of itself conclusive of the existence of a trust: *Parkman v. Suffolk Sav. Bank*, 151 Mass. 218, 24 N. E. 43, and cases cited.

The fact the money is deposited in a bank by one as trustee, however, gives the bank notice that the funds are trust property and not the individual property of the trustee. And if the money is in reality trust property, the bank, having notice of its character, cannot apply such deposit to satisfy an individual debt due to the bank from the trustee: *National Bank v. Insurance Co.*, 104 U. S. 54; *Bundy v. Monticello*, 84 Ind. 119; *Johnson v. Bank*, 56 Mo. App. 257; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, 41 N. E. 728; *Shepard v. Meridian Nat. Bank*, 149 Ind. 532, 48 N. E. 346. The word "trustee" after the name of a depositor is not merely *descriptio personae*, but is a description of the fund deposited, importing the existence of a trust and giving notice of the character of the fund: *Shepard v. Meridian Nat. Bank*, 149 Ind. 532, 48 N. E. 346; *Bundy v. Monticello*, 84 Ind. 119. If a bank appropriates the funds deposited by a trustee to the satisfaction of a private debt due it from the trustee, the bank may be held liable for such misappropriation of the trust funds: *American*

Trust etc. Co. v. Boone, 102 Ga. 202, 66 Am. St. Rep. 167, 29 S. E. 182; Shepard v. Meridian Nat. Bank, 149 Ind. 532, 48 N. E. 346. A bank in which trust funds have been deposited is liable for any participation in the misappropriation of such funds: Swift v. Williams, 68 Md. 236, 11 Atl. 835; Bank v. Clapp, 76 N. C. 482. Ordinarily, a bank may assume that a trustee will apply funds deposited with it to the proper trust purposes, and is not accountable for any misappropriation in which it does not participate: American Trust etc. Co. v. Boone, 102 Ga. 202, 66 Am. St. Rep. 167, 29 S. E. 182; Loring v. Brodle, 134 Mass. 453.

Where a trustee deposits funds in a bank to his personal account, and the bank subsequently fails, it is clear that the trustee may be held liable for the loss of the deposit: See Estate of Arguello, 97 Cal. 196, 31 Pac. 937; Commonwealth v. McAllister, 28 Pa. St. 480; Williams v. Williams, 55 Wis. 300, 42 Am. Rep. 708, 12 N. W. 465, 13 N. W. 274; Naltner v. Dolan, 108 Ind. 500, 58 Am. Rep. 61, 8 N. E. 289. If the deposit is made to the separate account of the trust estate, the trustee will not generally be personally liable for loss which results through the failure of the bank: Estate of Arguello, 97 Cal. 196, 31 Pac. 937; Williams v. Williams, 55 Wis. 300, 42 Am. Rep. 708, 12 N. W. 465, 13 N. W. 274. All that the authorities seem to require, in order to relieve the trustee from personal liability in case of the failure of the bank is that the deposit shall be made in such a manner as to preserve its trust character on the books of the bank in which the fund is deposited: Naltner v. Dolan, 108 Ind. 500, 58 Am. Rep. 61, 8 N. E. 289. Hence it seems to follow that if the mere designation of a depositor as trustee is sufficient to stamp the deposit as a trust fund, then in case of the failure of the bank the trustee would not be personally liable. But in O'Connor v. Decker, 95 Wis. 202, 70 N. W. 286, the court intimates that a deposit in the name of a person as guardian is not a sufficient setting apart of the deposit as a trust fund as will relieve the trustee from personal liability if the deposit is lost. The court in this case held that if a guardian wished to protect himself from loss by a failure of the bank, the deposit must be made as the trust funds of the specific trust to which they belong. And the same rule would be applied to a deposit in the name of one as trustee. This was apparently the rule announced in McAllister v. Commonwealth, 30 Pa. St. 536, the court saying that if a trustee undertakes "to make a deposit in a banking institution, the entry must go down on the books of the institution, in such terms as not to be misunderstood, that they are the funds of the specific trust to which they belong. He cannot so enter them as to call them his own to-day, if they are good, and to-morrow, if bad, ascribe them to the estate, or shift them in an emergency from one estate to another." From this statement it would appear that a mere deposit to one as trustee would

permit a shifting from one trust estate to another, and that only where the deposit is to the credit of a specific trust is the trustee relieved from liability in case the deposit is lost: See, also, *Booth v. Wilkinson*, 78 Wis. 652, 23 Am. St. Rep. 443, 47 N. W. 1128. However, the mere fact that a deposit is made in the name of one as trustee constitutes in itself sufficient notice of the existence of a trust, and it might seem that this was such a separation of the trust money from the individual money of the trustee as to relieve him from liability in case the deposit is lost: See as suggesting such a rule, *State v. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753, 6 N. E. 928; *Atterbury v. McDuffee*, 31 Mo. App. 603.

Effect of Deed in Favor of "Trustee."—A conveyance to a named person, followed by the word "trustee," without naming the beneficiary, or in any manner stating the character of the trust, is wholly insufficient to create any trust: *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825. Hence, as respects the creation of an express trust, the word "trustee" is merely *descriptio personae*: See, also, *Barrett v. Cochran*, 11 S. C. 29. We have already seen that the designation of a beneficiary is essential to the creation of an express trust. The absence of a defined beneficiary in a deed of trust is fatal to the existence of any trust, so far as the deed or any other instrument alone is concerned: See *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, 16 N. E. 305. We are not concerned here with the creation of valid trusts by deed, but simply if a deed is executed in favor of a trustee, nothing else being stated in the deed, what is the effect.

So far as concerns the legal title to the property conveyed, there is no doubt that a conveyance to one, "trustee," conveys the legal title to him individually: *Andrews v. Atlanta Real Estate Co.*, 92 Ga. 260, 18 S. E. 548; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246; *Den v. Hay*, 21 N. J. L. 174; *Greenwood Lake etc. R. R. Co. v. New York etc. R. R. Co.*, 134 N. Y. 435, 31 N. E. 874; *Van Schaick v. Lese*, 31 Misc. Rep. 610; 66 N. Y. Supp. 64. So far as the vesting of the title in the grantee is concerned, the word "trustee" is purely *descriptio personae*. But while the legal title vests in the trustee, he holds for the use and benefit of a beneficiary, if it can be shown that there is one, and hence, not holding the title in his own right, a judgment against him personally will not be a lien on the land: *Boardman v. Willard*, 73 Iowa, 20, 34 N. W. 487. In New York a distinction seems to be drawn between a deed to "A, trustee," and a deed to "A, as trustee." In the first case the deed conveys the title to A as an individual; in the second case the title is conveyed to A as trustee: *Van Schaick v. Lese*, 31 Misc. Rep. 610; 66 N. Y. Supp. 64; *Greenwood Lake etc. R. R. Co. v. New York etc. R. R. Co.*, 134 N. Y. 435, 31 N. E. 874. See, also, *Wallace v. Langston*, 52 S. O. 133, 29 S. E. 552. And the word

"trustee," in a deed to "A, trustee," seems to be considered in these cases solely as *descriptio personae*, and as surplusage which may be disregarded. But there appears to be no reason why the word "trustee" in a deed should not constitute notice that there may be a trust in existence, sufficient to put a subsequent purchaser upon inquiry as to the power of the trustee to convey, the same as in the case of a promissory note or of corporate stock. To be sure, the mere use of this word in a deed is inadequate to create a trust, but if the trust has been otherwise legally declared, or if the grantee can be held as a trustee of a resulting or constructive trust, the trust will be enforced, notwithstanding the deed fails to disclose the terms of or to sufficiently declare a trust. And we believe the better rule to be, that the word "trustee" in a deed can be considered as surplusage which is to be wholly disregarded only when there are no facts outside of the deed sufficient to create either an express trust or a trust by operation of law. And the authorities support this rule, and the mere use of the word "trustee," without naming the beneficiary or disclosing the nature of the trust, is regarded as something more than mere *descriptio personae*. Thus, while the word "trustee" in a deed does not give notice of the name of the beneficiary, or the character of the trust, yet it does give notice of a trust of some description, and is alone sufficient to impose the duty of inquiry upon any third person dealing with the property: *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825; *Railroad Co. v. Durant*, 95 U. S. 576; *Johnson v. Calnan*, 19 Colo. 168, 41 Am. St. Rep. 224, 34 Pac. 905. A purchaser must use due diligence in making inquiry concerning the trusts which exist in the property: *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825. Parol evidence is admissible to establish the terms of the trust and to identify the beneficiaries. The terms of the deed indicate that the grantee does not take beneficially but for someone else, and parol evidence is allowed to explain the deed: *Johnson v. Calnan*, 19 Colo. 168, 41 Am. St. Rep. 224, 34 Pac. 905; *Railroad Co. v. Durant*, 95 U. S. 576. And if the trustee acknowledges that he holds the property in trust for a certain beneficiary, he will hold the property for the benefit of such beneficiary: *Boardman v. Willard*, 73 Iowa, 20, 34 N. W. 487. And in such a case the real beneficiary may enforce the trust as against a subsequent purchaser who takes with notice of the trust: *Sleeper v. Iselin*, 62 Iowa, 583, 17 N. W. 922. If a conveyance is made to a trustee on trusts thereafter to be declared, and the trusts are subsequently declared and accepted by the trustee, the trustee is bound and the trusts may be enforced against him: *Ireland v. Geraghty*, 11 Biss. 465, 15 Fed. 35.

Where there is a valuable and adequate consideration moving from the grantee, and nothing either in the deed or elsewhere to

indicate that he takes for the benefit of another, the mere designation of him as "trustee" will not make him one. Such word is simply one of description and will be disregarded as surplusage: *Andrews v. Atlanta Real Estate Co.*, 92 Ga. 200, 18 S. E. 548. And one who binds himself by a covenant under seal is personally liable thereon, though he may designate himself a trustee: *Wallace v. Langstan*, 52 S. C. 133, 29 S. E. 552.

STATE v. GARBROSKI.

[111 Iowa, 496, 82 N. W. 959.]

CONSTITUTIONAL LAW—CLASS LEGISLATION—WHEN VALID.—Legislation in favor of a particular class of individuals, in order to be valid, must extend to and embrace equally all persons who are or may be in the like situation or circumstances, and the classification must be natural and reasonable, not arbitrary or capricious.

CONSTITUTIONAL LAW—SPECIAL PRIVILEGES TO VETERANS—PEDDLER'S TAX.—A statute which requires a license fee to be paid by all persons who peddle in the country, except veterans of the Civil War, is unconstitutional and void, since it grants to one class of citizens privileges or immunities that on the same terms do not belong to all.

Byron W. Preston and H. H. Sheriff, for the appellant.

L. C. Blanchard, James Carroll, and Milton Remley, attorney general for the state.

497 LADD, J. The evidence tended to show that defendant peddled goods in Mahaska county, outside of any city or town, without first having obtained a license from the county auditor so to do. He asserts that, even though the evidence may have warranted his conviction, the statute under which the prosecution was had is in contravention of the constitution of the state. Section 1347 of the code reads: "Peddlers plying their vocation outside of a city or town shall pay for the use of the county an annual tax of ten dollars; those with a vehicle drawn by one animal, twenty-five dollars; those with four or more animals, seventy-five dollars. But the board of supervisors of any county may remit the tax where it is deemed that the articles to be sold are of an educational nature, or where the parties desiring to peddle are, because of age or infirmity, incapacitated for manual labor. Nothing in this section shall be held to apply to parties selling their own work or production, either by .

themselves or employés, nor to persons who have served in the Union army or navy, or to persons selling at wholesale to merchants, nor to transient venders of drugs." The particular point made is that, as it grants immunity from the tax to peddlers who served in the army or navy of the United States during the Civil War, it is in conflict with section 6 of article 1 of the constitution. That section reads: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens." That this statute grants a privilege to persons who have served in the Union army and navy, not available to others, is manifest. It is the ⁴⁹⁸ privilege of plying the vocation of peddling outside of cities and towns without the payment of the annual tax exacted from others. This is not dependent on a present situation or condition, nor on relations or circumstances suggesting the necessity or propriety of different legislation for the exempted class. The authorities generally recognize that, for the purposes of efficient and beneficial legislation, it is often necessary to divide the subjects upon which it operates into classes. As said by Justice Field in *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161: "The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application." The extent to which division may be carried without running into special, or what is known as "class" legislation, is sometimes difficult to determine. All the authorities agree that the distinction in dividing may not be arbitrary, and must be based on differences which are apparent and reasonable. Thus, the supreme court of Minnesota, in *Nichols v. Walter*, 37 Minn. 262, 33 N. W. 800, declared: "The true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason—some reason suggested by necessity; by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." This was approved in *Lavallee v. St. Paul Ry. Co.*, 40 Minn. 249, 41 N. W. 974. In *Johnson v. Minneapolis Ry. Co.*, 43 Minn. 222, 45 N. W. 157, the same court, through Mitchell, J., said: "It has sometimes been loosely stated that special legislation is not class, if all persons brought under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike, under

the same conditions, all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions." In *State v. Hammer*, 42 N. J. L. 439, the supreme ⁴⁹⁰ court of New Jersey held that: "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation." The supreme court of Tennessee, in *Sutton v. State*, 96 Tenn. 696, 36 S. W. 697, very tersely states the law to be that legislation, to be constitutional and valid, "must possess each of two indispensable qualities: 1. It must be so formed as to extend to and embrace equally all persons who are or may be in the like situation or circumstances; and 2. The classification must be natural and reasonable, and not arbitrary or capricious." To the same effect, see *State v. Loomis*, 115 Mo. 307, 22 S. W. 350; *State v. Haun*, 61 Kan. 146, 59 Pac. 341; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 286; *Ex parte Jentzsch*, 112 Cal. 468, 44 Pac. 803; *Evansville v. State*, 118 Ind. 426, 21 N. E. 267; *Magoun v. Illinois etc. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594. In the last case, Justice McKenna, speaking of the equal protection of the laws required by the fourteenth amendment to the constitution of the United States, said: "It does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both ⁵⁰⁰ in the privileges conferred and the liabilities imposed." The same court, speaking through Justice Brewer in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, declared that "the differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

It will be observed that while the language of the courts differs somewhat, there is no controversy concerning the rules

which govern in determining what legislation is inhibited by the constitution as class. The difficulty arises in their application. No unvarying test of likeness or unlikeness of conditions and circumstances can well be laid down. Nor is this desirable. Necessarily, much must depend on the facts of each case. The classification here attempted rests solely on a past and completed transaction, having no relation to the particular legislation enacted. All citizens are divided into two classes—those who served in the army and navy thirty-five years ago, and all those who did not. True, as suggested, the veterans came from no particular class; but the trouble with this statute is that it attempts to make of them a class in legislation, in the operation of which there can be no substantial distinction between them and others. In present conditions and circumstances, there are no differences between them, in their relation to society and the administration of the law, and other citizens of the state. Possibly a veteran soldier or sailor would be preferred, everything else being equal, for civil office, because of superior fitness, resulting from discipline of service in war; for “it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state.” But the work of a peddler calls for no qualities such as a soldier or sailor acquires in the service. Equality in right, privilege, burdens, and protection is the thought running through the constitution and laws of the state; and an act intentionally and necessarily creating inequality therein, based ⁵⁰¹ on no reason suggested by necessity or difference in condition or circumstances, is opposed to the spirit of free government, and expressly prohibited by the constitution. If the ultimate object of this section was, as suggested, to prevent the separation of society into classes or castes such as exist in other lands, it may not be amiss to observe that these, in large part, had their origin in the honors and emoluments bestowed because of achievements in arms and military service. In *In re Keymer*, 148 N. Y. 219, 42 N. E. 667, the court of appeals of New York, in holding that veterans might not, under the constitution of that state, have preference to certain appointments in the civil service, regardless of qualifications, as provided by statute, said: “In the first place, this act refers only to veterans of the Civil War, and creates a favored class. The veteran who seeks a place in the civil service, where compensation does not exceed four dollars per day, is exempted from competitive examina-

tion, while every other citizen must submit to it. This is contrary to the letter and spirit of the constitution, and renders the act void." In *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1007, the supreme judicial court of Massachusetts gave the negative answer to this question: "Can the legislature constitutionally provide that certain public offices and employments which it has created shall be filled by veterans, in preference to all other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices and employments by some impartial and competent officer or board charged with some public duty in making the appointments?" See *Sewickley School Dist. v. Osburn School Dist.*, 19 Pa. Co. Ct. Rep. 257; *In re Sweeley*, 67 N. Y. St. 257; 33 N. Y. Supp. 369. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are declared to be entitled to different privileges, under the same conditions. It is then that discriminations may be said to impair ⁵⁰² that equal right which all can claim in the operation of the laws: *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730. In requiring the license fee from one class of persons for peddling in the country not exacted from another following the same vocation, there was unwarranted discrimination, rendering the statute void. It undertakes to grant to certain citizens or classes of citizens privileges or immunities that on the same terms do not belong to all. The constitution aims at equality of rights, privileges, and capacities, and the state has no favors to bestow, except such as, from the nature of the case, cannot be possessed and enjoyed by all. As said by Judge Cooley: "Privileges may be granted to particular individuals, when by so doing the rights of others are not interfered with; but everyone has the right to demand that he be governed by general rules, and a special statute which singles his case out, to be regulated by different laws from those that are applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government. Those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor—for the favorite at court and the countryman at the plow": Cooley on Constitutional Limitations, 6th ed., sec. 482. Or, as declared in *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285: "The right of every individual must stand or

fall by the same rule of law that governs every other member of the body politic, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not all others, when there is no public necessity for such discrimination, is unconstitutional and void." The classification attempted by this statute is based on no apparent necessity, or difference in conditions or circumstances that have any relation whatever to the employment ⁵⁰³ in which the veteran of the Civil War is authorized to engage without paying license. It savors more of philanthropy (worthy of the highest commendation, in its proper sphere) than of reasonable discrimination, based on real or apparent fitness for the work to be done.

Reversed.

CLASS LEGISLATION.—THE RIGHTS OF EVERY INDIVIDUAL must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional: *State v. Goodwill*, 38 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285. The legislature cannot constitutionally provide that public offices which it has created shall be filled by veterans in preference to other persons: *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005.

FRED MILLER BREWING COMPANY v. CAPITAL INSURANCE COMPANY.

[111 Iowa, 590, 82 N. W. 1023.]

JUDGMENT — VALIDITY — SERVICE AND FILING OF COMPLAINT.—Under the statutes of Wisconsin, in a suit upon a contract for the payment of money only, service of summons confers jurisdiction upon the court to enter judgment against the defendant, and a judgment by default is valid though the complaint has not been served on the defendant and it was not filed with the clerk until the time judgment was entered.

JUDGMENT — SUIT BEGUN IN WRONG COUNTY.—A judgment rendered in the county where the action is commenced is valid, although the action is commenced in the wrong county, in the absence of a request by the defendant for a change of venue.

JUDGMENT — FOREIGN — PARTIES—COLLATERAL ATTACK.—In a suit upon a foreign judgment, advantage cannot be

taken of the fact that in the original action all the proper parties were not before the court.

JUDGMENT—PARTIES TO SUIT—ACTION ON INSURANCE POLICY.—A MORTGAGEE is a proper party plaintiff in an action upon an insurance policy for the benefit of the mortgagee, and a judgment in favor of such mortgagee is valid, where both mortgagor and mortgagee had stipulated that the loss should be awarded to him.

PLEADING—DEFECT OF PARTIES—WAIVER.—A defect of parties, patent upon the face of a complaint, is waived by making no objection thereto.

STATUTE OF LIMITATIONS—COMMENCEMENT OF ACTION.—Under the statutes of Wisconsin an attempt to commence an action is equivalent to commencing it, so far as the statute of limitations is concerned, when the summons is delivered to the proper officer, with the intent that it shall be served, within the time specified in the statute, although it is not actually served until after the expiration of such time.

STATUTE OF LIMITATIONS—PLEADING—WAIVER.—The statute of limitations is an affirmative defense which must be pleaded, and is waived by permitting default to be entered.

JUDGMENT—ENTRY BY CLERK—VALIDITY.—A judgment, though in fact entered by the clerk, is, in consideration of law, the act and determination of the court, and is as valid as any other judgment.

STATUTES OF SISTER STATE.—THE CONSTRUCTION given by the courts of one state to its own constitution and statutes will, under all ordinary circumstances, be followed by the courts of a sister state.

JUDGMENT OF SISTER STATE—WHEN VALID.—A judgment of one state, rendered by a court having jurisdiction of the parties and the subject matter, although under a procedure peculiar to that state, if valid there, must be recognized in other states as binding on the parties thereto.

Cummins, Hewitt & Wright and C. E. Campbell, for the appellant.

Dudley & Coffin, for the appellee.

592 LADD, J. The facts out of which this action grew are detailed in *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 95 Iowa, 31, 63 N. W. 565, which was followed in reversing judgment for the defendant on the former hearing: *Fred Miller Brewing Co. v. Capital Ins. Co.* (Iowa), 63 N. W. 568. Service of the summons on Winchester was there held to have conferred jurisdiction on the circuit court of Milwaukee county to enter judgment against the defendant. It will be remembered, however, that such service was had in Clark county, of that state, November 2, 1888, and that the summons, with the return of service, was filed with the clerk in Milwaukee county on the 10th of that month. On the thirty-first day of December,

1889, the complaint, duly verified, with the affidavit of plaintiff's attorney, that no answer or demurrer had been received, was presented to the clerk, and judgment thereupon entered. This was in pursuance of section 2891 of the statutes of that state: "Judgment may be had if the defendant fails to answer the complaint as follows: In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk, with the summons and complaint, proof of personal service of the summons on one or more of the defendants, and that no answer or demurrer has been received, or if any such has been received, that the same has been struck out by order of the court or a judge, and that no answer or demurrer has been received, and the time granted by an order therefor has expired. If the complaint be duly verified, the clerk shall thereupon enter judgment for the amount demanded in the complaint, against such defendant or defendants, or against one or more of the several ⁵⁹³ defendants in the case provided for in section 2884." Under the practice statute of Wisconsin the court acquired jurisdiction from the time of service of the summons (section 2626), which, among other things, necessarily designated the post-office address of plaintiff or its attorney, at which place papers in the case might be served: Sec. 2630. The statute did not require service of the complaint, but, if this were omitted, the defendant might, within twenty days from the service of the summons, demand a copy thereof, which must be served on him within twenty days thereafter: Sec. 2633. "The summons must be filed with the clerk, and a state tax on the action of one dollar paid, within ten days after the service of an answer or demurrer, or, if no answer or demurrer be served, at the time of applying for judgment": Sec. 2642. So that the summons, in the absence of an answer or demurrer, was not necessarily filed with the clerk until the time judgment was entered. Nor do these statutes seem to contemplate the filing of a complaint until that time. Provision for copies by the adverse party, rather than information from the court records, as in this state, is made; and it plainly appears from section 2898, requiring that "the clerk, immediately after entering the judgment, shall attach together and file the summons, pleadings, or copies thereof, proof of service, and that no answer or demurrer has been received," that it is not until then these papers are necessarily filed with him. As the affidavit must show no answer or demurrer to have been received, the inference is clear that the time within which the copy of the

complaint may be demanded and an answer or demurrer served must elapse after service of the summons before judgment may be demanded by the complainant, and this, at the most, might not exceed forty days. So there is nothing in the contention that relief could be had at any time subsequent to the service of summons. Nor is there any analogy between these statutes and the section of our code requiring the petition to be on ⁵⁹⁴ file ten days before term time. For this reason the presumption cannot be indulged that, in the absence of a statute in Wisconsin fixing the period during which the complaint shall be on file with the clerk, the law is like that of this state. The differences are manifest. Here judgment may not be entered in vacation except by agreement, nor by the clerk unless on the order of the court. There the practice favors the formation of issues in vacation, and also the disposition of all causes in which a money judgment is the only relief sought, without the interposition of the judge whenever it is legally apparent there will be no contest.

2. But it is urged that the action was begun in the wrong county. True, the summons was served in a county other than where the judgment was entered. Even though it should have been commenced in Clark county, under the laws of Wisconsin, as in Iowa, in the absence of a request by the defendant for a change of venue it might be prosecuted to judgment where brought. Section 2621 of the statute of Wisconsin, in part, reads: "When the county designated in the summons or complaint in any action is not the proper place of trial thereof, the defendant may, within twenty days after the service of the complaint, serve upon the attorney for the plaintiff a demand in writing that the trial be had within the proper county, specifying it, unless there be more than one such county, and a reason therefor. Within five days after service of such demand the plaintiff's attorney may serve a written consent that the place of trial be changed, and specifying to what county, having the option to name one or two or more in which it may be properly triable, and such consent shall change the place of trial accordingly. If the plaintiff's consent be not so served, the defendant may, within twenty days after the service of his demand, move to change the place of trial, and shall have costs if his motion be granted." It is evident that no consent was given or motion filed, else the judgment would not have been rendered in Milwaukee county. A situation will not be assumed, in the ⁵⁹⁵ absence of proof, to defeat the acts of an

officer apparently clothed with authority, and discharging duties imposed upon him by statute. The service of the complaint could not have been more than forty days after that of the summons, and twenty days yet remained during which a motion might have been addressed to the court. But no such motion was included in the judgment-roll. We are satisfied that no objection to the venue was interposed.

3. The appellant also contends that in no event might the plaintiff maintain the action. - One Maier owned the property insured, and the loss, if any, was made payable to Fred Miller, mortgagee, as his interest might appear. The mortgage had been assigned to the plaintiff before the fire. The complaint alleged these facts, compliance with all the conditions of the policy on the part of the insured, and that the amount due on the mortgage exceeded the face of the policy. In *Hammel v. Queen Ins. Co.*, 50 Wis. 244, 6 N. W. 805, decided in 1880. the supreme court of Wisconsin held that the mortgagee to whom the loss under an insurance policy was payable as his interest might appear might maintain an action thereon without joining the assured as a party plaintiff. This decision stood unchallenged, save by the dissent therein filed, until 1893, when it was overruled, the court holding that the mortgagee, under such circumstances, had not sufficient interest to entitle him to recover: *Williamson v. Michigan etc. Ins. Co.*, 86 Wis. 393, 39 Am. St. Rep. 906, 57 N. W. 46; *Carberry v. German Ins. Co.*, 86 Wis. 323, 56 N. W. 920; *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 390. We need not inquire what might have been the outcome had this case been appealed in 1888, on the theory suggested that the personnel of that court had not so changed until 1891 as to remove the majority concurring in *Hammel v. Queen Ins. Co.*, 50 Wis. 244, 6 N. W. 805, in 1880. It is enough to say that until that decision was overruled it was at least a mooted question in that state whether the mortgagee could maintain ⁵⁰⁶ an action without joining the assured as party plaintiff, and necessarily to be determined by the trial court. The circuit court of Milwaukee county had acquired jurisdiction of the parties and of the subject matter, and was, therefore, clothed with the power to determine whether all the parties necessary for the adjudication were before it. If it should be admitted that its conclusion was erroneous, this may not be taken advantage of in a collateral attack. Correction must necessarily have been sought through appeal or other appropriate procedure according to the laws of Wisconsin. The

mortgagee was certainly a proper party plaintiff; and even had the insured been joined, under the allegations of the petition, confessed by default to be true, the judgment must necessarily have been awarded to this plaintiff. Why? Because both had stipulated the loss should be so applied: See *Mershon v. National Ins. Co.*, 34 Iowa, 87; *Bartlett v. Iowa State Ins. Co.*, 77 Iowa, 86, 41 N. W. 579; authorities collected in 11 Ency. of Pl. & Pr. 395. The judgment was strictly within the facts of the complaint, and the defect of parties, if such there was, patent on its face, and waived by making no objection: *Melick v. First Nat. Bank*, 52 Iowa, 94, 2 N. W. 1021; *Hefner v. Northwestern etc. Ins. Co.*, 123 U. S. 751, 8 Sup. Ct. Rep. 337. To uphold a judgment by default it is not essential that the petition be free from defect. In *Bosch v. Kassing*, 64 Iowa, 312, 20 N. W. 454, this court declared "that a defendant may be concluded by a default when the facts stated in the petition do not constitute a good cause of action in law, or when the petition is so defective as to be vulnerable to demurrer": See *Johnson v. Mantz*, 69 Iowa, 710, 27 N. W. 467. Judgments beyond the pleadings even have been adjudged erroneous, and not void: *York v. Boardman*, 40 Iowa, 57; *Traer v. Whitman*, 56 Iowa, 443, 9 N. W. 339. As stated in an early Ohio case: "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a cause is presented that brings this power into action. But before the power can be affirmed to exist, ⁵⁹⁷ it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected": *Sheldon v. Newton*, 3 Ohio St. 494; *Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. 135; *Reed v. Muscatine*, 104 Iowa, 183, 73 N. W. 579; *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 38 Am. St. Rep. 747, 55 N. W. 218. "It is of no avail," remarked Justice Miller in *Cooper v. Reynolds*, 10 Wall. 316, "to show that there are errors in the record, unless they be such as to prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power." The Wisconsin court acquired jurisdiction to decide who were necessary parties, and the correctness of its conclusions may not be again investigated in this proceeding.

4. The summons was served October 13, 1888, or more than six months after the fire, which occurred March 30th of that year. It was stipulated in the policy that "no suit or action upon this policy for the recovery of any claim shall be sustainable in any court of law or equity unless com-

menced within six months next ensuing after the fire." Under the decisions of Wisconsin this period is computed from the time of the fire (*Hart v. Citizens' Ins. Co.*, 86 Wis. 77, 39 Am. St. Rep. 877, 56 N. W. 332), and not from the accruing of the right to sue, as in this state: *Read v. State Ins. Co.*, 103 Iowa, 310, 64 Am. St. Rep. 180, 72 N. W. 665. Something is claimed for section 4240 of the statutes of that state, which provides that "an attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of any provision of law which limits the time for the commencement of an action, when the summons is delivered with the intent that it shall be actually served, to the sheriff or to the proper officer of the county in which defendants, or one of them, usually or last resided." This must be followed by service within sixty days. The attempt to commence the action within six months was proven: *Woodville v. Harrison*, 73 Wis. 360, 41 N. W. 598 527. It is insisted, however, that this statute has reference alone to the rights of parties under the statute of limitations, and that under a special contract limiting the time within which suit must be brought the general rule obtains that "a civil action . . . shall be commenced by the service of a summons": Sec. 2629. Such is the holding in this and other states: *Proska v. McCormick*, 56 Iowa, 318, 9 N. W. 289; *Howard Ins. Co. v. Hocking*, 130 Pa. St. 170, 18 Atl. 614; *McElroy v. Continental Ins. Co.*, 48 Kan. 200, 29 Pac. 478. But it was unnecessary to aver in the petition that the summons was served within the period fixed. That must necessarily be determined from an inspection of the return of service and proof of the date of the fire. The limitation in this contract, like that of the statute, does not affect the liability, but relates solely to its enforcement. While a part of the contract, it has sole reference to the remedy, and, like the statutory limitations, when interposed as a defense, is in the nature of a plea in confession and avoidance. That it may be waived is well settled: *Garretson v. Hawkeye Ins. Co.*, 65 Iowa, 468, 21 N. W. 781; *Horst v. London etc. Ins. Co.*, 73 Tex. 67, 11 S. W. 148; *Martin v. State Ins. Co.*, 44 N. J. L. 485, 43 Am. Rep. 397; and excuses may exist for not bringing suit within the time stipulated: *Semmes v. Hartford Ins. Co.*, 13 Wall. 159; *Killips v. Putnam Ins. Co.*, 28 Wis. 472, 9 Am. Rep. 506; *Day v. Dwelling House Ins. Co.*, 81 Me. 244, 16 Atl. 894. We refer to these authorities to show that reasons exist for requiring the limitation by contract to be set up as an affirmative defense quite as strong

as in the case of limitations by statute; as essential in order to enable the plaintiff in the one case to obviate the limitation in a contract by proof of waiver or excuse as in the other to bring himself within some exception of the statute. While the point has never been determined in this state, an examination of the cases discloses the uniform practice of the defendant interposing the plea. We deem it an affirmative defense, available to the defendant ⁵⁹⁹ as a personal privilege, and waived by permitting default to be entered: *Andes Ins. Co. v. Fish*, 71 Ill. 620; 4 *Joyce on Insurance*, sec. 3223; *Barber v. Fire etc. Ins. Co.*, 16 W. Va. 658, 37 Am. Rep. 800.

5. Again, the appellant asserts that the statutes of Wisconsin authorizing the clerk of court to enter judgment in vacation is in contravention of the constitution of that state vesting the judicial power in certain enumerated courts. That question was set at rest in the early case of *Wells v. Morton*, 10 Wis. 468, though by a divided court, and for nearly forty years the practice has been unchallenged. The conclusion reached was that "the judgment, though in fact entered by the clerk, is in consideration of law, what it purports on its face to be, the act and determination of the court." On the same theory a judgment entered on confession has been adjudged valid in this state. "Though entered by the clerk it is not to be treated as a judgment rendered by him, but by the court, and is subject to revision in this court in the same manner as any other judgment of the district court": *Edgar v. Greer*, 7 Iowa, 138; *Grattan v. Matteson*, 54 Iowa, 232, 6 N. W. 298; *Kendig v. Marble*, 58 Iowa, 529, 12 N. W. 584; *Risser v. Martin*, 86 Iowa, 396, 53 N. W. 270. The construction given its statutes and the interpretation of its constitution by the highest court of a state will, under all ordinary circumstances, be followed by the courts of a sister commonwealth: *Glos v. Sankey*, 148 Ill. 555, 36 N. E. 631; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Gilchrist v. West Virginia etc. Land Co.*, 21 W. Va. 115, 45 Am. Rep. 555; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 8 Sup. Ct. Rep. 974; *Goodnow v. Wells*, 67 Iowa, 654, 25 N. W. 864. This is especially true with respect to the practice in courts, for the vital inquiry is not whether a mistake has been made in construction or interpretation, but whether, under the law as there administered, a valid judgment was rendered. Under the constitution of the United States and the acts of ⁶⁰⁰ Congress the records and judicial proceedings of Wisconsin, when properly authenticated,

are entitled to such faith and credit in this state "as they have by the law or usage in the courts of the state from whence the said records are or shall be taken." The supreme court of the United States, in *Pennoyer v. Neff*, 95 U. S. 714, after exhaustive consideration of the matter, said: "In the earlier cases it was supposed that the act gave to all judgments the same effect in other states that they had in the state where rendered, but this view was afterward qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject matter": See, also, *Grover etc. Machine Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. Rep. 92; *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. Rep. 139. The circuit court of Wisconsin having acquired jurisdiction over the defendant and the subject matter, the procedure peculiar to that state, if valid there, must be recognized as binding on the parties here. Such was our conclusion in *Greasons v. Davis*, 9 Iowa, 219, where transcripts of judgments rendered by a prothonotary in Pennsylvania in accordance with the usages of that state were held entitled to full faith and credit in Iowa, although not conforming to the practice in this state: See, also, *Taylor v. Runyan*, 3 Iowa, 474; *Crafts v. Clark*, 31 Iowa, 77; *Melhop v. Doane*, 31 Iowa, 400, 7 Am. Rep. 147; *Clemmer v. Cooper*, 24 Iowa, 185, 95 Am. Dec. 720; *Pollard v. Baldwin*, 22 Iowa, 332.

6. Lastly, it is said the proceedings had before the clerk were not judicial in character, and for this reason the judgment rendered is not within the provisions of the constitution of the United States, nor entitled to recognition as such under the law of nations. The practice of allowing clerks and prothonotaries to enter ⁶⁰¹ judgments by default and on confession in vacation without direction of court or judge is of very ancient origin, dating back to near the time when written were substituted for oral pleadings. It now prevails in many states, where judgments so rendered are treated as those ordered by the court. They are subject to correction on appeal or by motion, and until corrected are as much a verity as though the court had rendered them: *McConkey v. McCraney*, 71 Wis. 576, 37 N. W. 822. As already observed, the judgment is, under *Wells v. Morton*, 10 Wis. 468, "in consideration of law, what it purports to be on its face, the act and determination of

the court." In *Kipp v. Fullerton*, 4 Minn. 473, in speaking of a judgment entered by the clerk, the court said: "I can see no difference as to the effect of a judgment whether it be rendered directly by the court itself or indirectly through its clerk. In either case it is the judgment of the court; otherwise, a judgment entered by the clerk is a mere nullity, for under our constitution he is vested with no judicial power. We must, therefore, presume, when the clerk is authorized to act in such capacity, that his action is the action of the court, and that in such instance he merely enters in form the inevitable sentence or decision of the law, resulting from certain ascertained facts." To the same effect, see *Heinrich v. Englund*, 34 Minn. 395, 26 N. W. 122; *Crawford v. Beard*, 12 Or. 447, 8 Pac. 537; *Bond v. Pacheco*, 30 Cal. 530; *Providence Tool Co. v. Prader*, 32 Cal. 634, 91 Am. Dec. 598; 2 *Freeman on Judgments*, sec. 575. The authorities holding that a judgment of a state court having jurisdiction of the parties and subject matter should have the same credit, validity, and effect in every other court in the United States as it had in the state where it was pronounced are very numerous, and without conflict. This judgment was valid, as we have seen, in Wisconsin, and under this rule must be so regarded in this state. It is not important to inquire what was the character of the clerk's acts—whether purely ministerial or in part judicial. Full opportunity for the ^{cor} correction of any error was afforded under the practice of that state, and the defendant ought not to be permitted to avail itself of any there may have been to defeat an action on a judgment which might be enforced against its property if found there. In *McLaren v. Kehler*, 23 La. Ann. 80, 8 Am. Rep. 592, a similar action, the court concluded that: "If the judgment is conclusive in Wisconsin, it is equally conclusive in Louisiana. The courts of this state are estopped from all inquiry into its correctness, and are precluded from considering issues": *French v. Pease*, 10 Kan. 53; *Swift v. Stark*, 2 Or. 97, 88 Am. Dec. 463; *Cook v. Thornhill*, 13 Tex. 293, 65 Am. Dec. 63. Such has been the conclusion in other states with respect to judgments entered by clerks: *Coleman v. Waters*, 13 W. Va. 278; *Taylor v. Smith* (Tenn. Ch. App.), 36 S. W. 970; *Knapp v. Abell*, 10 Allen, 485. *Greasons v. Davis*, 9 Iowa, 219, is decisive of the question. As the judgment is valid in Wisconsin, under the acts of Congress, it must be so regarded here.

Affirmed.

A JUDGMENT OF A COURT OF ONE STATE is conclusive in the courts of another, if the court pronouncing it had jurisdiction of the cause and the parties: *Mutual Fire Ins. Co. v. Phoenix Furn. Co.*, 108 Mich. 170, 62 Am. St. Rep. 693, 66 N. W. 1095.

FOREIGN STATUTES.—IN THE INTERPRETATION of a statute recourse is properly had to the decisions of the courts that have placed a construction upon it in the state in which it is enacted. Such decisions are deemed essentially a part of the law itself: *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127.

THE STATUTE OF LIMITATIONS MUST BE PLEADED in order to be available: *Gilbert v. Hewetson*, 79 Minn. 826, 79 Am. St. Rep. 486, 82 N. W. 655.

LIMITATION OF ACTIONS.—AN ACTION IS COMMENCED, within the meaning of the statute of limitations, when the writ is sued out and delivered to the sheriff or sent to him with the bona fide intention of having it served: *Note to Montague v. Stelts*, 34 Am. St. Rep. 744. See, too, *Cox v. Martin*, 75 Miss. 229, 65 Am. St. Rep. 604, 21 South. 611.

STATE v. CHAUVET.

[111 Iowa, 687, 83 N. W. 717.]

HOUSE OF ILL-FAME—CORROBORATION OF ACCOMPLICE.—The evidence of an accomplice of one charged with keeping a house of ill-fame, which consists in the use of a covered wagon, with which he traveled from place to place, is sufficiently corroborated by the defendant's admissions, and his apparent control of the wagon and team.

HOUSE OF ILL-FAME.—A COVERED WAGON, drawn from place to place, and used as a place of abode for human beings, where prostitution is carried on, is a house within the meaning of a statute prohibiting the keeping of a house of ill-fame.

C. R. Metcalf, for the appellant.

Milton Remley, attorney general, and Charles A. Van Vleck, assistant attorney general, for the state.

688 **SHERWIN, J.** The defendant was convicted of keeping a house of ill-fame, which consisted in the use of a covered wagon, with which he traveled from place to place, and in which prostitution was carried on. The principal witness for the state was a young woman who testified that she was engaged to go with the defendant in a wagon furnished by him, for the purpose of sexual commerce for hire throughout the country, and that she did very frequently indulge therein in the wagon in question, with the knowledge and at the solicitation of the defendant, and that the wages of her sin were given

over to the defendant. The defendant insists that this witness was an accomplice, within the meaning of the law, and that her evidence as to his keeping the wagon is not sufficiently corroborated. It may well be doubted whether this position is tenable, but, if it is, the evidence in corroboration is ample. His admission, and his apparent control of the wagon and team, authorized the jury to find as it did, for they tended to connect him with the commission of the offense, and this is all the statute requires: *State v. French*, 96 Iowa, 255, 65 N. W. 156.

The defendant contends that the keeping of a covered wagon for the purpose of prostitution and lewdness cannot ^{be} brought within the statute prohibiting the keeping of a house of ill-fame; that a structure, to constitute a house, must be fixed in some particular locality, and be substantial and abiding. The statute does not say that these conditions shall exist, or define what shall be considered a house, within its meaning. That houses may be built of stone, brick, wood, iron, glass, or any other material, or combination thereof, which may suit the fancy of the builder, cannot, we opine, be successfully controverted. If this be true, then it may be built of such materials as are commonly used in the construction of wagons and the covers thereto. Nor are we aware of any fixed and definite size or shape necessary to create a house in legal contemplation. The Century Dictionary defines a house as "an abiding place; an abode; a place or means of lodgment." The evidence shows this wagon to have been fixed up with a black cover—likely to correspond with the shades of night. It had a curtain in front, which was dropped when occasion required the concealment of the harlot and her lascivious visitor. In it alone the defendant and his companion in sin abode and found lodgment and shelter for several weeks prior to his arrest. If a stone house were being moved from one point to another in the same city or town, or from one town to another, as has been done, and during the time of such moving it was used for purposes of prostitution, could it be held that the mere fact of its being on wheels destroyed its character? We think not. If used as a place of abode for human beings, it would still be a house. The boat which floats for months each year upon some beautiful sheet of water, and carries the entire family and numerous friends of its opulent owner, is denominated a "house boat." And why? Because it is the temporary abiding place of its occupants, and answers the purpose, for the

time being, of the most expensive and stationary palace. In *State v. Mullen*, 35 Iowa, 207, it was held that a boat on the Mississippi river ⁶⁹⁰ was a house of ill-fame, within the meaning of the statute. It does no violence to the statute nor to sound reason to hold that a wagon, under the conditions shown in this record, is also within the contemplation thereof. The judgment is affirmed.

Granger, C. J., not sitting.

DISORDERLY HOUSE—WHAT IS.—A canvas tent may be a disorderly house: *Killman v. State*, 2 Tex. Ct. App. 222, 28 Am. Rep. 432. For further illustrations of what have been held to be disorderly houses or houses of ill-fame, see *Beard v. State*, 71 Md. 275, 17 Am. St. Rep. 536, 17 Atl. 1044; *State v. Plant*, 67 Vt. 454, 48 Am. St. Rep. 821, 32 Atl. 237.

THOMSON v. SMITH.

[111 Iowa, 718, 83 N. W. 789.]

FIXTURES—CONDITIONAL SALE—PURCHASER WITHOUT NOTICE.—A vendor, who makes a conditional sale of personal property to one who attaches it to his real estate in such a manner as to render it a fixture, has no rights in such personal property as against an innocent purchaser of the realty for value.

FIXTURES.—WAGON SCALES, resting on a foundation of stone and mortar, within which the platform hung, the supporting rods entering an office building through its walls and floor, and there connected with the scale beam, such scales being intended for permanent use in connection with particular real estate, are fixtures.

FIXTURES—TEST.—To constitute a fixture there must be actual annexation to the realty or something appurtenant thereto, application to the use or purpose to which that part of the realty with which it is connected is appropriated, and the intention of the party making the annexation to make a permanent accession to the freehold.

Plaintiff purchased at sheriff's sale real estate on which were wagon scales. Pearson & Brother, intervenors, set up a conditional sale of the wagon scales and prayed judgment for the balance due. Plaintiff had purchased for value without notice of the intervenor's claim to the wagon scales.

Steele & Robbins and Cummins, Hewitt & Wright, for the appellant.

Sam C. Smith, for the appellees.

⁷¹⁹ LADD, J. The plaintiff, as purchaser at the sheriff's sale, had no notice of the intervenor's claim to the wagon scales until after he had taken possession of the premises under the sheriff's deed. He then acquired precisely the same right to the fixtures under the deed as though he had bought directly from the defendant, and, conceding the sale of the scales by intervenor to defendant to have been conditioned as contended, this would not affect the title of a third party buying in good faith without notice: *Stillman v. Flennicken*, 58 Iowa, 450, 43 Am. Rep. 120, 10 N. W. 842; *Brinkhoff v. Munzenmaier*, 20 Iowa, 513; 13 Am. & Eng. Ency. of Law, 628. Under our statute, the intervenor, in the absence of notice to the purchaser, would have been entitled to no protection, had the scales been sold as personal property: Code, sec. 2906. If they became attached to the realty, and a part of it, a ⁷²⁰ sale of the land under like conditions would as certainly carry title thereto. The vendor, having put it in the power of the vendee to attach them as a fixture to the land, and as such to sell to innocent purchasers, is not in a situation to complain when this was done: *Wickes v. Hill*, 115 Mich. 333, 73 N. W. 375. See *Ice etc. Co. v. Lone Star Engine etc. Works*, 15 Tex. Civ. App. 694, 41 S. W. 835; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166, and note, 35 N. E. 802; *Muir v. Jones*, 23 Or. 332, 19 L. R. Ann. 441, and note, 31 Pac. 646.

2. But were these wagon scales fixtures at the time of the sale? The building on the same lot was equipped with machinery for, and used as, a feed-mill. The scales rested on a foundation wall of stone and mortar, within which the platform hung. The earth was removed somewhat below the surface, leaving a pit within the walls about twenty inches deep. The only testimony indicating the manner of attachment to this wall is that of defendant, who said: "The scales are not hung to the frame. They set on castings in the corner—the stirrups that set in the castings. It was necessary to put down a solid foundation for these castings to set on; that is, two by twelve plank laid on the stone, the castings on the corners, and the scales set in those castings, just framed around the outside—six by six or six by eight timber." As we understand this, the platform of the scales, on which wagons are drawn, was hung by stirrups attached to its frame, in castings resting on plank laid on the foundation. From beneath this platform the supporting rods extended through the wall under the building through its floor to the beam on the inside, where the

weight was ascertained. The record fails to disclose whether any part was fastened in any way, save as indicated, to the wall or building. But it may be assumed that, as large amounts of grain were weighed, the fastenings were sufficient to hold the scales in their proper place. It ⁷²¹ should also be added that up to October, 1896, the defendant got along with small scales in the mill; and at that time he began dealing in grain for shipment, and put in the scales in controversy mainly for that purpose. The grain was weighed thereon, and then hauled to the cars; but he made use of his office in the mill in carrying on this business, and weighed thereon at least one-fourth of the grain to be ground in the mill. In *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719, the court recognized the united application of the following requisites to be the true criterion in testing whether an article is a fixture: 1. Actual annexation to the realty or something appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is appropriated; 3. The intention of the party making the annexation to make a permanent accession to the freehold. The intention was treated in that case as a matter of paramount importance, and this seems to be the modern rule, but the first and second requisites were by no means dispensed with. Annexation is the *sine qua non* of an article, in order that it be a fixture. But it has long been recognized, as in the above case, that a physical attachment to the realty is not always essential: *Congregational Soc. v. Fleming*, 11 Iowa, 533, 79 Am. Dec. 511; *McGorrick v. Dwyer*, 78 Iowa, 279, 16 Am. St. Rep. 440, 43 N. W. 215; *Shepard v. Blosson*, 66 Minn. 421, 69 N. W. 221, 61 Am. St. Rep. 431; *Washburn on Real Property*, 14; *Feder v. Van Winkle*, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628; 13 Am. & Eng. Ency. of Law, 605. Thus, in the early case of *Walker v. Sherman*, 20 Wend. 636, Cowan, J., remarked that: "Nothing of a personal nature in itself would pass under a deed to land, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building upon it. It need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or rend any part of the building." And in ⁷²² *Wolford v. Baxter*, 33 Minn. 18, 53 Am. Rep. 1, 21 N. W. 745, the court, through Mitchell, J., said "that, to make an article a fixture, it must not merely be essential to the business of the structure, but it must be attached to it in some way, or at least it must

be mechanically fitted, so as, in ordinary understanding, to constitute a part of the structure itself. It must be permanently attached to, or the component part of, some erection, structure, or machine which is attached to the freehold, and without which the erection, structure, or machine would be imperfect or incomplete." Boilers and engines by which machinery is propelled, merely resting on suitable foundations, have been repeatedly declared a part of the land. This is because so fitted to the foundations, which are unquestionably of the realty, and erected for the special purpose of sustaining them, that they are deemed a portion of the structure. And in numerous cases retention of heavy machinery or structures in place by force of gravity has been deemed sufficient attachment: *Snedeker v. Waring*, 12 N. Y. 170; *Holland v. Hodgson*, L. R. 7 Com. P. 334; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Smith v. Blake*, 96 Mich. 542, 55 N. W. 978; *Langdon v. Buchanan*, 62 N. H. 657; *Alvord etc. Mfg. Co. v. Gleason*, 36 Conn. 86. So, while these scales may not have been physically attached, by bolts, nails, or cement, to the land, they were nevertheless held thereto by being so mechanically fitted as that the platform hung within the wall supporting it, and erected for that sole purpose, and the supporting rods entering the building through its walls and floor, connecting with the beam above. Besides, such scales are ordinarily placed for permanent use in connection with particular real estate. True, they might have been removed, by taking apart, without injury to the land. This, however, is not a controlling circumstance, and is of chief importance as bearing on the intention with which the attachment was made: *Doughty v. Owen* (N. J. Eq.), 19 Atl. 540; *Sweetzer v. Jones*, 35 Vt. 317, 82 Am. Dec. 639. See cases collected in 13 Am. & Eng. Ency. of Law, 602. ⁷²³ The connection was sufficient to bring the case within the first requisite.

3. That the scales were placed for use in connection with the building admits of no doubt. The office therein was occupied by the defendant both in operating the mill and in dealing in grain for shipment. While the scales could possibly have been dispensed with in the former business, though with much inconvenience, they could not well have been in the latter. Besides, their actual rather than necessary use is the point involved. They were not only used in connection with the building in both businesses, but were set for that express purpose.

4. The character of the annexation and the use, if found, is mainly of importance in determining the intention of defendant

in making it. This intention is not the secret purpose of the owner, but that which should be implied from his acts. This is ordinarily to be inferred from the nature of the article, the manner and object of its use, and mode of its annexation: *Howell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29, 22 Am. St. Rep. 373, 24 Pac. 920. Everything indicates that the scales were intended to remain permanently where located, and to be continually used in connection with the land—the character of the foundation, the connection with the beam inside, their convenience in defendant's business, both as miller and dealer in grain. That they extended a few inches in a neighboring lot is not material to this inquiry, as the owner of that made no objection. As well say a house a few inches over the line is not real estate. In *O'Donnell v. Burroughs*, 55 Minn. 91, 56 N. W. 579, relied on by the appellee, the scales were in the street. But see *McGorrick v. Dwyer*, 78 Iowa, 279, 16 Am. St. Rep. 440, 43 N. W. 215, where track scales, though on the land of a railroad, were held to be fixtures attached to the building similarly situated. *Arnold v. Crowder*, 81 Ill. 56, 25 Am. Rep. 260, and *Bliss v. Whitney*, 9 Allen, 114, 85 Am. Dec. 745, hold similar platform scales part of the realty. We are of opinion those in controversy were intentionally annexed permanently to the land, and passed with it under the sheriff's deed.

Reversed.

Granger, C. J., not sitting.

FIXTURES.—TO DETERMINE WHETHER A THING is a fixture, we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used: *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147, 22 Pac. 184. See, too, *Atchison etc. R. R. Co. v. Morgan*, 42 Kan. 23, 16 Am. St. Rep. 471, 21 Pac. 809. The intention of the parties is a controlling consideration: *Edwards etc. Co. v. Rank*, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765.

FIXTURES.—PLATFORM SCALES are a part of the realty: *Arnold v. Crowder*, 81 Ill. 56, 25 Am. Rep. 260; *Bliss v. Whitney*, 9 Allen, 114, 85 Am. Dec. 745; *Dudley v. Foote*, 63 N. H. 57, 56 Am. Rep. 489.

FIXTURES.—A PURCHASER FOR VALUE and without notice of realty to which chattels have been annexed is entitled to them as against one who claims them under a prior agreement by which they were not to lose their identity as chattels: *Landigan v. Mayer*, 82 Or. 245, 67 Am. St. Rep. 521, 51 Pac. 649. See, too, *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166, 35 N. E. 802.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

CITIZENS' BANK v. MILLET.

[103 Ky. 1, 44 S. W. 366.]

NEGOTIABLE INSTRUMENTS—WAIVER OF PROTEST.—If the words "no protest" are written across the face of a bill of exchange sued on, it is not necessary to specifically allege a waiver of protest.

NEGOTIABLE INSTRUMENTS—BILLS OF EXCHANGE—LIABILITY OF AGENT.—If an agent in his own name draws a bill of exchange on his principal for a debt of the latter, such debt is sufficient consideration to bind the agent, and render him personally liable therefor.

NEGOTIABLE INSTRUMENTS—EVIDENCE TO VARY OR CONTRADICT.—Parol evidence is inadmissible to show an agreement between the payee and one who draws a bill of exchange as agent, that the payee was to look alone to the principal of such agent for payment.

S. B. and R. D. Vance, for the appellant.

Yeaman & Lockett, for the appellee.

GUFFY, J. On the 18th of December, 1894, the appellant filed in the clerk's office of the Henderson circuit court its petition against W. W. Shelby and William Soaper, a firm doing business under the firm name of the Henderson Hominy Mills, and against the appellant J. B. Millet. The petition reads as follows:

"The plaintiff, the Citizens' Bank, a corporation organized under the laws of the state of Tennessee, and doing business in the town of Dyersburg, Tennessee, says, that for several months past the defendants W. W. Shelby and William Soaper were partners, doing business in the city of Henderson, and

state of Kentucky, under the firm name of Henderson Hominy Mills, and while they were copartners, to wit, on November 30, 1894, the defendant J. B. Millet drew his certain draft, a bill of exchange of that date, payable at sight on the said Henderson Hominy Mills, and in ³ favor of plaintiff for the sum of \$2,750.72, which said draft was presented to and accepted by the said Shelby and Soaper, under the style of the Henderson Hominy Mills on the fifth day of November, 1894, and on the eighth day of November, 1894, said draft was duly presented to said defendants for payment, and payment thereof demanded, but no part thereof was paid. The said draft is herewith filed as part hereof, no part of which has been paid.

"The plaintiff further says that the defendant J. B. Millet drew his certain other draft or bill of exchange dated December 1, 1894, on the said defendants Shelby and Soaper, under the firm name of the Henderson Hominy Mills, payable at sight in favor of plaintiff for \$2,475.53, which said bill of exchange was duly presented to defendants for payment and the payment thereof demanded of them, but no part thereof was paid. The said bill is herewith filed as part hereof. The consideration of the said bill of exchange was the sum of \$2,475.53, paid by this plaintiff on the checks of the defendants Shelby and Soaper, and used in payment for corn purchased for them by the defendant J. B. Millet, as their agent. The said checks were paid upon the express agreement of the said defendants that they would accept the draft of the defendant J. B. Millet drawn upon them for the amount thereof when requested by this plaintiff. And he says by reason thereof the said defendants became and are indebted to him in the said sum of \$2,475.53, and are liable therefor on the said bill of exchange. The defendant the Ohio Valley Banking and Trust Company and James S. Alres have received from the said Shelby and Soaper a conveyance of their property in trust for the payment of their debts, ⁴ and have accepted said trust and have qualified as such trustees. No part of the said debt has been paid.

"The premises considered, the plaintiff prays judgment against the defendants for the sum of \$2,750.72, with interest from November 30, 1894, and for the further sum of \$2,475.53, with interest from December 1, 1894, for their costs and for all proper relief.

S. B. & R. D. VANCE,
"Attys. for Plaintiff."

The drafts referred to in the foregoing petition are as follows:

NO PROTEST.

"\$2,750.72 Dyersburg, Tenn., Nov. 30, 1894.
 "Buying Department Henderson Hominy Mills.
 "At sight ——— pay to the order of Citizens' Bank,
 twenty-seven hundred and fifty and 72-100 dollars.
 Collect through Farmers' Bank, Henderson, Ky.
 "Value received and charge the same to account of
 "For corn. J. B. MILLET.
 "To Henderson Hominy Mills, No. 414, Henderson, Ky."

NO PROTEST.

"\$2,475.53. Dyersburg, Tenn., Dec. 1, 1894.
 "Buying Department Henderson Hominy Mills.
 "At sight ——— pay to the order of Citizens' Bank,
 two thousand and four hundred and seventy-five 53-100
 dollars. Collect through Farmers' Bank, Henderson, Ky.
 "Value received and charge the same to account of
 "For corn. J. B. MILLET.
 "To Henderson Hominy Mills, No. 415, Henderson, Ky."

Shelby and Soaper made no defense, and judgment was rendered by default against them for the amounts claimed. The appellee Millet filed his separate answer, which reads as follows: The defendant J. B. Millet, for his separate answer to plaintiff's petition, states: That at the time the two drafts sued on were drawn and delivered to the plaintiff, the defendants Shelby and Soaper were, as stated in the petition, partners in the name of the Henderson Hominy Mills, and were manufacturing great quantities of corn into hominy. This defendant was the agent of said hominy mills for the purchase of corn to be shipped to them to be used in their said business. Prior to the making of either of said drafts said hominy mills made an arrangement with the plaintiff bank, by which it was agreed between said hominy mills and the plaintiff that the defendant, as the agent of said mills, should purchase corn in the neighborhood of Dyersburg, and give the checks of the said mill therefor on the plaintiff, and that at convenient periods the amounts paid by plaintiff on such checks should be balanced by drafts drawn on said hominy mills. After said arrangement had been entered into, this defendant, as such agent purchased large quantities of corn for said hominy mills, and gave checks therefor on plaintiff, signed Henderson Hominy Mills, by J. B. Millet, and afterward, at convenient periods, gave to plaintiff drafts on said mills for the aggregate amount of such checks,

all of which drafts, prior to the one dated November 30, 1894, were paid by said hominy mills. After the last draft that was paid, and prior to said November 30th, this defendant, as such agent, purchased other corn and gave checks therefor on plaintiff, signed as aforesaid, amounting ⁶ to \$2,750.72, when, on said November 30th, he gave plaintiff the draft for that amount, being the one first set forth in the petition. Afterward and prior to December 1, 1894, he, as such agent, purchased other corn, and gave checks therefor on plaintiff, signed as aforesaid, amounting in the aggregate to \$2,475.53, when, on December 1st, he gave plaintiff a draft for that amount, being the one secondly set forth in the petition.

Defendant alleges that in the giving of said drafts, and in all of said transactions, he acted solely as the agent of said Henderson Hominy Mills, which fact was well known to and perfectly understood by the plaintiff, and the plaintiff accepted said drafts as the drafts of said hominy mills, and solely upon their credit, and not as the drafts or acts of this defendant in his own right, and in accepting said drafts the plaintiff gave credit solely to, and looked for payment thereof solely to, said hominy mills, and not at all to this defendant, and, so far as this defendant is concerned, there was no consideration whatever for either one of said drafts.

This defendant has no knowledge or information sufficient to form a belief that either of said drafts were ever presented for payment or payment thereof demanded. He prays to be dismissed with his costs and for all proper relief.

Plaintiff demurred to the first paragraph of the answer, but afterward withdrew same, and filed its reply, which is as follows: "The plaintiff, for reply to the first paragraph of the answer of J. B. Millet herein, says: It denies that in giving the drafts mentioned in the petition the defendant acted solely as the agent of the Henderson Hominy Mills, or that plaintiff accepted ⁷ said drafts, or either of them, as the drafts of said hominy mills, or solely upon their credit, or that in accepting said drafts it gave credit solely to said hominy mills, but plaintiff says that said drafts were drawn as the drafts of the defendant Millet, and were accepted by the plaintiff as his drafts, and in reliance upon his credit, as well as that of the said Henderson Hominy Mills.

"Plaintiff says that the arrangement for the payment of the checks of the said hominy mills was made by the defendant Millet, who, in consideration that plaintiff would pay said checks,

agreed and promised that when thereunto requested by plaintiff he would draw his personal bill of exchange on the said hominy mills for the amount of the checks so paid and in payment thereof. And plaintiff says that the bills sued on were drawn in pursuance of said agreement, and as the personal bills of the defendant Millet, and were accepted by plaintiff as such, and in reliance upon the credit of the said Millet as the drawer thereof. Plaintiff prays as in its petition and for all proper relief.

"S. B. & R. D. VANCE,

"Attys. for Plaintiff."

Afterward appellee filed the following rejoinder: The defendant Millet denies that the drafts sued on were drawn as his drafts, or were accepted by plaintiff as his drafts or in reliance upon his credit. Defendant denies that he, in consideration that plaintiff would pay the checks of the Henderson Hominny Mills, agreed or promised to draw his personal bill of exchange on said hominy mills for the amount thereof or in payment of said checks. It is not true that in pursuance of such agreement the said drafts were drawn as the personal bills of the defendant, or were accepted by ^s plaintiff as such or in reliance upon the credit of this defendant as the drawer thereof. Wherefore he prays as in his answer and for all proper relief.

A trial resulted in a verdict and judgment for the appellee. Appellant's grounds for a new trial are as follows: 1. For error of law occurring at the trial and excepted to by the plaintiff as follows: In permitting evidence on behalf of said defendant that he signed the bills of exchange only as agent of the Henderson Hominny Mills. In giving to the jury instructions numbered 1 and 2, and in refusing to give instructions A, B, and C, asked for the plaintiff. 2. Because the verdict is not sustained by sufficient evidence, and is contrary to law.

Wherefore, plaintiff moves the court to grant it a new trial as against said Millet. Plaintiff's motion for a new trial having been overruled, it prosecutes this appeal.

The plaintiff read as evidence the bills sued on heretofore copied, together with indorsements thereon, showing that they had been assigned to some other parties for collection, but the assignments being regarded and treated as of no consequence. One of the bills appears to have been accepted by the Henderson Hominny Mills and the other not accepted. The plaintiff also introduced C. T. Starling, who testified as follows: "I am cashier of the Farmers' Bank of Kentucky at Henderson." Being shown the said bills of exchange, the witness said that "the

one of date November 30, 1894, being for \$2,750.72, came to our bank for collection." He did not know whether the other one did or not, nor did he know whether they were ever presented to the Henderson Hominy Mills or to Shelby and Soaper for payment. "The collection ⁹ clerk takes out the bills for collection, and I do not know to whom he presented them. Hugh Atkinson was our collection clerk at the date of these bills."

Sam Heilbronner was then introduced for plaintiff, who testified as follows: "In December, 1894, I was bookkeeper for the Henderson Hominy Mills. The bill dated November 30, 1894, was presented to the Henderson Hominy Mills on December 5, 1894, for payment, and was accepted by me in writing on the face of it. The other bill was never presented to me." The word "refused," written on the back of it, was written by Mr. David Banks. On cross-examination he said that after he accepted the bill it was never afterward presented for payment as far as he recollected, and that when he accepted it, it was presented only for acceptance.

The plaintiff then introduced Hugh Atkinson, who testified as follows: That in December, 1894, he was discount and collection clerk in the Farmers' Bank of Kentucky, at Henderson, Kentucky; that the bill in suit of date November 30, 1894, came to the Farmers' Bank for collection. "Our custom was when we received paper on the Henderson Hominy Mills to telephone to Mr. Heilbronner, and he would come up and accept them, and in this case I suppose he came to the bank, as the bill has his acceptance on it." On cross-examination witness said he did not know whether anything further was said to the hominy mills about paying the bill after it was accepted. "The course is, when a draft is accepted, I enter it up and file it to the date it was due. My father places it in open file, and they are not presented for payment any more. I have no recollection of this particular draft, but I identify it as one that passed through my hands by my writing on ¹⁰ the back of it. A great many such drafts come to the bank, and I think we received four or five drawn in favor of the Citizens' Bank of Dyersburg on the Henderson Hominy Mills and signed like this one is signed. I do not know what became of the draft dated November 30, 1894."

David Banks was next introduced for plaintiff, who testified as follows: That he was cashier of the Planters' State Bank of Henderson, Kentucky. "The bill in suit, dated December 1.

1894, passed through my bank, having been sent to it for collection, and was presented by me to the firm of Shelby & Soaper for payment. I telephoned them at the hominy mills that I had the bill for collection, and its payment was refused by them. The word 'refused,' indorsed on the back of the bill, was written by me." On cross-examination witness said he did not remember whether it was Shelby or Soaper to whom he talked through the telephone, but recognized the voice at the time, and knew it was one of them, and then knew which one it was. "The distance from the bank where I was to the hominy mills is about eight or ten blocks. That was the only presentation of the bill I ever made." On re-examination witness said he presented the draft immediately after it reached the bank through the mail, as he was aware of the assignment made by Shelby & Soaper the day before. "My impression is that the assignment was made on the fifth day of December."

The defendant testified for himself as follows: "I reside in Henderson, Kentucky, and am acquainted with the Citizens' Bank of Dyersburg, Tennessee. The Henderson Hominny Mills is located at Henderson, and that bank is located in Dyersburg, Tennessee. My connection with the Henderson ¹¹ Hominny Mills began on the eighth day of September, 1894, as agent to buy corn on a salary. I operated in the neighborhood of Dyersburg, Newburn and Yates, and was buying in all the different points along the road. As such agent, I had dealings with the plaintiff bank. I do not remember exactly when that dealing commenced, but it was after I had made contracts for purchasing corn that the Henderson Hominny Mills through me made arrangements with the bank to furnish the money to pay for the corn. These contracts were made with the parties who shelled the corn in the shuck, and the Henderson Hominny Mills was to pay them four cents per bushel for shelling the corn, and for every car they loaded I gave them a check on the Dyersburg Bank, and when I made my rounds, I gave the bank a draft for the whole amount on the Henderson Hominny Mills. The persons who did the shelling loaded the corn into the cars, and I paid them by giving a check on the Dyersburg Bank, signed Henderson Hominny Mills, by J. B. Millet. The bank had no money on deposit to the credit of the Henderson Hominny Mills with which to pay these checks; the checks were balanced by a draft for the full amount of the checks up to its date drawn by me on the Henderson Hominny Mills. [Witness produced the stubs of his check-book, which were read to the jury, showing

the checks given on the Dyersburg Bank for corn purchased for the Henderson Hominy Mills.] The amounts, \$486.07, dated November 7, 1894, \$530.72, dated November 9, 1894, \$2,383.17, dated November 17, 1894, \$6,845.80, dated November 23, 1894, \$2,743.87, dated November 30, 1894, and \$2,469.36, dated December 1, 1894, are amounts for which bills were drawn by me on the Henderson ¹² Hominy Mills to take up the checks, which had been drawn on the bank, and paid by it, the last two being those for which the bills sued on were drawn. In the bill dated November 9, 1894, is included \$2.50 exchange charged by the bank on the bill; in that of date November 17, 1894, is included \$5.94 exchange. In that of date November 23, 1894, \$17.11 exchange; in that dated November 30, 1894, \$6.85 exchange, and in that dated December 1, 1894, \$6.17 exchange. The bank knew that I was buying corn as agent for the Henderson Hominy Mills, and it was the understanding and agreement between the bank and myself that the amounts paid by the bank of the checks drawn by me were to be covered by drafts on the Henderson Hominy Mills. My salary was in no way dependent on the payment of these drafts."

W. W. Shelby was next introduced by defendant, who testified as follows: "I was one of the members of the firm of Henderson Hominy Mills. Am acquainted with the defendant Millet. He was our agent for purchasing corn in Dyersburg. Millet was authorized to give drafts on us in payment for corn bought by him. He gave a number of drafts on us, several of which were paid. I had no communication with the plaintiff bank, except that I received a letter from them, the same which is here now shown me." The said letter was read in evidence to the jury, and is in words and figures as follows:

"Dyersburg, Tenn., Nov. 16, 1894.

"Henderson Hominy Mills, Henderson, Ky.

"Gentlemen: Your Mr. Millet is buying quite a lot of corn in this vicinity, and has made arrangements with us to handle his drafts on you. We have reason to believe that ¹³ he is your representative, but as the drafts are drawn without B. of L. attached, we prefer to have you authorize us to pay all his drafts.

Yours truly,

"A. R. WOOLLEN,

"Asst. Cashier."

"In answer to that letter I wrote and placed in the mail the letter, a copy of which is here now shown me."

The defendant then offered to read to the jury the said copy, to which plaintiff objected; but its objection was overruled, and plaintiff excepted, and the defendant then read the said copy in evidence to the jury, which is in words and figures as follows:

“Henderson, Ky., 11, 17, 1894.

“A. R. Woollen, Assistant Cashier, Dyersburg, Tenn.

“Mr. J. B. Millet is our duly authorized agent, and all his drafts will be promptly paid. He is a man in whom we have the greatest confidence, and will without doubt deal fairly with your people.

Yours truly,

“HENDERSON HOMINY MILLS,

“W. W. SHELBY,

“Manager.”

The appellee was recalled and testified as follows: “I stated to the bank that I was the authorized agent of the Henderson Hominy Mills, and they gave me a blank book to give them checks, and when I came back I would give them a draft for the whole amount. The bank knew that I was the authorized agent of the Henderson Hominy Mills, and furnished a book containing the blank checks, which I was to use in drawing on it for the money paid for the corn.” Witness produced one of the checks taken from the said book filled out in pencil, which was read to the jury, and is as follows:

14 “Dyersburg, Tenn., Dec. 4, 1894.

“Citizens’ Bank.

No. ———.

“Pay to the order of Hall & Co., \$313.87. Three hundred and thirteen 87-100 dollars.

“Buying department Henderson Hominy Mills, for one car-load of corn.

HENDERSON HOMINY MILLS,

“By J. B. MILLET.”

“That was the form of check which I drew on the bank in payment for corn bought by me.”

Plaintiff then introduced A. R. Woollen, who testified as follows: “I was assistant cashier of the plaintiff Citizens’ Bank at the time the bills in suit were drawn, and had been since March 1, 1889. The bills in suit were made by Mr. Millet to take up checks on the bank given by him for corn bought for the Henderson Hominy Mills. Mr. Millet was introduced to us by Mr. Sugg, as representing the Henderson Hominy Mills. He had come over to buy corn for them, and he made with the bank an arrangement to have it pay the checks of the Henderson Hominy Mills drawn by him for the corn as he bought it,

and at convenient periods he was to give the bank his draft on the Henderson Hominy Mills to take up the checks for the amount that had been paid by the bank at that time. The bank never requested him to draw any draft, but that was done at his own motion, and there was no understanding or agreement between him and the bank that they were not his individual drafts, or that he was not to be responsible on them. Nothing was said about that." On cross-examination witness said the bank did not request Millet to draw these two drafts. They were drawn in ¹⁵ pursuance of the arrangement previously made and to cover the amounts that had been taken out for the Henderson Hominy Mills for the payment for corn. Witness said he had written a letter to Shelby, which had been previously read. Witness made no inquiries about Millet, except to find out whether he was the authorized representative of the hominy mills. Made no inquiries as to his solvency. He received the letter written by Mr. Shelby, a copy of which had been read to the jury. On re-examination witness said the arrangement before stated was made with Millet before the receipt of the letter from the Henderson Hominy Mills, and that the bills in suit were accepted as the bills of Millet.

The court then instructed the jury as follows:

1. The court instructs the jury to find for the plaintiff the two bills filed and read them, with interest from the date at which they were presented to the hominy mills for payment.

2. But if the jury find from the evidence that Millet was the agent of the Henderson Hominy Mills, and the plaintiff knew that fact, and gave credit solely to said hominy mills, and these bills were drawn by Millet merely as evidence of the amount due said bank by said hominy mills, not intending to bind himself, and the plaintiff knew such to have been his purpose or intention when they accepted said bills, they will find for the defendant.

To the giving of which instructions appellant objected and excepted. The plaintiff offered instructions A, B, and C, which were refused by the court with exceptions. The instructions are as follows:

A. If the jury believe from the evidence that the bills ¹⁶ of exchange in the petition mentioned were drawn by the defendant J. B. Millet, in pursuance of an agreement by him with the plaintiff that his drafts on the Henderson Hominy Mills were to be given for the money plaintiff might advance on their checks made by said Millet, then they will find for the plaintiff.

B. If the bills sued on were made by Millet in payment of moneys advanced by plaintiff on the checks of the Henderson Hominy Mills made by him, and signed them in his own name, without notification to plaintiff that they were not to be binding on him, then they must find for plaintiff as to said bills.

C. If the jury believe from the evidence that the defendant Millet made an arrangement with the plaintiff, by which they were to handle his drafts on the Henderson Hominy Mills for money that he might need in buying corn for said mills, and the bills sued on were drawn in pursuance of such arrangement, then Millet is bound by said bills, and the jury will find for plaintiff thereon.

Appellee asked instructions X and Y, which were refused by the court with exceptions. Said instructions are as follows:

X. On motion of defendant Millet the court instructs the jury that upon the pleadings the defendant is entitled to a verdict, and they are directed to find for the defendant.

Y. If the jury believe from the evidence that Millet, as the agent of the Henderson Hominy Mills, engaged in the purchase of corn for said mills, made an arrangement with the plaintiff bank to pay for the corn purchased by drawing the checks of said hominy mills on said bank, and at intervals to draw bills upon the mills in favor of the bank for the ¹⁷ amount of said checks, and the bills in suit were so drawn and accepted by the bank, with the knowledge that the defendant Millet was drawing said bills simply to settle the amount advanced by the bank on the purchase of corn, they will find for the defendant Millet.

The first contention of appellee is that the petition is insufficient, for the reason it does not aver protest of the bills, or that protest was waived, and therefore the judgment should be affirmed without regard to any other question involved. But it will be seen that each bill has indorsed on the face thereof "no protest," which being a part of the bill in suit, the petition and bill together shows a right to recover, and it was not necessary to specifically aver a waiver of protest. If there had been any interlineation or change in the bill after it was signed, the defendant should have taken advantage of that by answer. We think the evidence establishes due presentation of the bills for payment; hence the only questions for decision are whether the bills were executed without any consideration, and whether the appellee

was entitled to plead and prove that the agreement between him and appellant was in substance that he was not to be bound upon the bills, but that they were accepted and treated alone as the obligation of the hominy mills. So far as the plea of no consideration is involved, it is sufficient to say that the existence of the debt against the hominy mills was a sufficient consideration to bind the appellee and render him liable for the debt, if he in fact agreed to pay the same or to be bound therefor. The bills in suit clearly import an obligation upon the part of the appellee to pay the same, ¹⁸ and unless he escape liability on account of some arrangement between him and appellant, judgment should have been rendered against him for the amount of the bills.

It is insisted for appellee that he was entitled to allege and prove the alleged agreement between him and appellant to the effect that he was not to be bound upon the bills; while it is earnestly contended for appellant that appellee could not be heard to plead and prove any such agreement, the same being in contradiction of the written agreement and contrary to the law in such cases. We deem it unnecessary to discuss or review all the authorities cited by counsel, but will first notice some of those relied on by appellee. The appellee cites Story on Bills, section 187, which seems only to go to the extent of holding that the plea of no consideration is good as between the drawer and the payee. Appellee also cites 1 Daniel on Negotiable Instruments, third edition, section 311. We quote as follows:

"It will be seen from preceding sections that if an agent should in his own name draw a bill of exchange on his principal for a debt of the latter, he will be personally responsible to the drawer in the case of the default of the principal, although upon its face the bill was drawn on account of his principal. And it is stated in the American Leading Cases to be the general rule that whenever an agent puts his name to a negotiable instrument, as a party to it, he is legally liable to the promisees and to indorsees upon it."

Section 311 says: "The English cases clearly bear out these views, but the weight of authority in the United States is otherwise, though the cases are not uniform. If a drawer signs himself A B, agent, and the payee takes the bill so ¹⁹ drawn on his principal debtor to whom he has given credit, and to whom he looks for payment, it has been said that there is really no valuable consideration for his liability.

But the debt of another is a valuable consideration, and, if the agent intended to be bound upon the draft, no other consideration will be necessary. Bills are constantly drawn for accommodation, and the transaction might be construed as intended to be of this character. We think, however, that a bill drawn by A B, agent, might well be distinguished from a note so signed, for the language is not inconsistent with the idea that the drawer signs as agent of the drawee whose name is disclosed upon the face of the instrument, while in a note none but the maker's name is disclosed. Therefore, parol evidence might well be admitted to show the real circumstances of the case from which might be inferred the understanding of the parties. When there is no intimation of agency accompanying the drawer's name, the case presented is more difficult. This view, however, may be presented when the buyer has parted with his goods upon the faith of the principal's credit. But dealing with his agent, he then has funds in the principal's hands, and it is his draft that the principal would honor, provided he knew the fact that he was indebted to the drawer."

Without quoting the entire section, it is sufficient to say that the doctrine contended for by appellee is not well sustained by the authorities, *supra*. It will also be seen that the draft in question was simply signed J. B. Millet, with direction to charge to his account:

In volume 3 of Kent's Commentaries, fourth edition, pages 80 and 81, it is said that, as between the original parties to negotiable paper, the consideration may be inquired into.

²⁰ In Parsons on Notes and Bills, second edition, page 93, cited by appellee, it is said, commencing on page 92: "If an agent signs a note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable on the note, and the principal will not be liable. And although it can be proven that the agency was disclosed to the payee when the note was made, and it was the understanding of all parties that the principal and not the agent should be held liable, this will not generally be sufficient to authorize the discharge of the agent, or to render the principal liable on the note. But the principal will be liable under such circumstances on the original consideration for which the note was given. And there may be cases in which the agent would not be personally liable on the bill or note, though there should be nothing on the

face of the instrument to indicate the agency. Thus if an agent in the execution of his agency incurs a debt on behalf of his principal, and draws on his principal a bill for the amount thereof in favor of the creditor, it has been held that the agent will not be held liable on the bill, if it was the understanding of the parties that he acted as agent merely, and did not intend to make the debt his own. The principal object in drawing the bill in such cases is to certify to the principal the amount due to the creditor, and the agent may, it seems, defend on the ground of want of consideration. Of course, this will not apply to a subsequent bona fide holder without notice. And if an agent draws a bill on a third person in his own name, but there is sufficient evidence on the face of the instrument to inform the drawee that he is to pay the amount on account of the principal and ²¹ not on account of the drawer, the drawee, having paid the bill, will not be entitled to maintain an action for money paid against the agent. Thus, where an agent of the owners of a steamboat drew a bill in his real name and directed the drawee to charge the amount to account of steamer 'Walter Scott,' it was held that the agency of the drawer was apparent on the face of the bill in consequence of this direction, which negatived the idea that he was to be personally bound."

The most that can be sustained from the foregoing is, that in some instances the agent has been allowed to escape liability by proving a parol agreement between him and the payee that the agent was not to be personally liable on the bill.

We will now proceed to notice some of the authorities relied on by appellant. In Story on Agency, ninth edition, section 155, it is said: "If from the nature and terms of the instrument it clearly appears, not only that the party is an agent, but that he means to bind his principal and to act for him, and not to draw, accept, or indorse the bill on his own account that construction will be adopted, however inartificial may be the language in furtherance of the actual intention of the instrument. But if the terms of the instrument are not thus explicit, although it may appear that the party is an agent, he will be deemed to have contracted in his personal capacity, and there is no defense on this point whether the instrument be a deed or an unsealed contract. Thus, if an agent should execute a deed in his own name, and should thereby, having acted on behalf of his principal, cove-

nant, etc., he would be personally bound thereby and not ^{as} his principal. So if an unsealed instrument should purport to be a memorandum of an agreement between A B, on behalf of C D, of the one part, and E F, of the other part, to execute a lease of certain premises of the principal, it would be held to be the contract of the agent and binding on him personally. A fortiori, an agent will be held to be personally bound if the name or character of the principal should not appear on the instrument, or if it should appear that no other person than himself could be legally bound by it, although he should sign his name thereto as agent, or as acting in an official capacity."

In section 156, after some preliminary remarks, the author gives the further illustration: "Thus, if a broker should sell goods and draw upon the buyer for the amount in his own name in favor of his principal, if the bill should be dishonored he would be personally liable, unless some special words were used in the bill to prevent it. And this liability would not only extend to third persons, but even to his principal, although he was known to be a mere agent. For in such case the bill imports upon its face a personal liability as drawer in favor of all persons who are or become parties to the bill, and there is nothing in the character of the agency which excludes such personal liability, if he chooses voluntarily to incur it in favor of his principal, as well as in favor of third persons. So if a known agent should draw a bill on a third person in favor of the payee, and direct the drawee to place the amount to the debit of his principal, he would be personally liable on the bill to the payee, unless he use other words to exclude it."

It is said in section 157: "Precisely the same personal ^{as} liability will attach to an agent, who in his own name signs a note as maker or a bill as drawer or accepts a bill or indorses a bill or note generally, for in such a case, although he is a known agent, the making or accepting or indorsing of the instrument is treated as an admission that it is his personal act, not only in respect to third persons, but also in respect to his principal."

In *Pentz v. Stanton*, 10 Wend. 275, 25 Am. Dec. 558, the court, in discussing the liabilities of parties to bills, and testimony admissible to show the real contract, quotes with approval from other decisions cited. "The parol testimony explaining and showing the real nature of the transaction was decided to

be inadmissible on the ground it contradicted or varied the written contract."

Judge Parker, in delivering the opinion of the court, says: "That no person in making a contract is construed to be an agent of another, unless he stipulates for his principal by name, stating his agency in the instrument, which he signs. This principle has been long settled and has been frequently recognized. Nor do I know," he continues, "an instance in the books of an attempt to charge a person as the maker of a written contract appearing to be signed by another, unless the signer professes to act as by procuration or authority, and states the name of the principal on whose behalf he gave his signature. He also discusses at length the admissibility of parol evidence in such cases to show the real character of the transaction, and holds it to be utterly incompetent on the ground which has already been stated": Quoting *Mayhew v. Prince*, 16 Mass. 54; *Meyer v. Barker*, 6 Binn. 228.

"It is well settled that if a private agent draw a bill or ²⁴ enter into any other contract in his own name, without stating that he acts as agent so as to bind his principal, he will be personally liable": Quoting *Chitty on Bills*, 36, and cases cited; *Lefevre v. Lloyd*, 5 Taunt. 749; 2 Marsh. 454; *Appleton v. Binks*, 5 East, 148; 1 Bos. & P. 368; 1 Term Rep. 181.

"It is not sufficient to charge the principal, or discharge the principal from personal responsibility, merely to subscribe himself as agent, if the language of the instrument imports a personal contract on his part": Quoting *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Buffum v. Chadwick*, 8 Mass. 103; *Van Reimsdyk v. Kane*, 1 Gall. 630, Fed. Cas. No. 16,872; Chit. 52; *Clark v. Van Reimsdyk*, 9 Cranch, 155. "But where the name of the principal appears on the face of the instrument or contract, and it is evident that the agent did not intend to bind himself personally, but acted merely on behalf of the principal, if he acted by competent authority, the principal and not the agent will be bound."

In 2 Strange, page 955, it is said: "A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing."

In Smith's Leading Cases, volume 2, Hare & Wallace's Notes, page 421, it is said: "It has been said that if A contract in writing without naming his principal, so that he appears upon the writing to be himself the principal, does not the creditor

who seeks to show that while thus professedly contracting for himself he really contracted for the principal endeavor to infringe this rule of evidence by adding to the written contract a new term at variance with the written contract? This question, however, it is apprehended, must receive different answers upon different occasions—answers varying according to the object with which it is sought to introduce the parol testimony, which thus submitted never ²⁵ can be heard for the purpose of discharging the agent, but may always be so for that of charging the principal. That parol evidence can never be admitted for the purpose of exonerating an agent, who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he mentioned his principal at the time of entering into it, seems to be now well established.”

Numerous decisions are quoted by the author. It is further said in *Leadbitter v. Farrow*, 5 Maule & S. 345, by Lord Ellenborough: “It is a universal rule that the man who puts his name to a bill of exchange makes himself personally liable, unless he states on the face of the bill that he subscribes it for another, or by procuration of another. Unless he says plainly, ‘I am the scribe,’ he becomes liable.”

In the case of *Nash v. Towne*, 5 Wall. 703, which was an action upon a bill of exchange, the court said: “Parol evidence can never be admitted for the purpose of exonerating an agent, who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed. Where a simple contract other than a bill or note is made by the agent, the principal whom he represents may, in general, maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was the agent, and that he was acting for his principal. Such evidence, says Baron Park, does not deny that the contract binds those who on its face it purports to bind, but shows ²⁶ that it also binds another, and that principle has been often adopted by this court. Cases may be found also where it is held that the plaintiff might prove by parol that the other contracting party named in the contract was but an agent of an undisclosed principal, and in that state of a case he might have his remedy against either at his election. Evidence to that effect

will be admitted to charge the principal or to enable him to sue in his own name, but the agent who binds himself is never allowed to contradict the writing by proving that he contracted only as agent, and not as principal."

In Randolph on Commercial Paper, volume 1, section 382, it is said: "The liability of the agent to the principal is next to be considered. Where the agent draws a bill of exchange on his principal by his authority, the principal is not in general liable as drawer. Nor is it necessary in such cases that the agency of the drawer should be expressed on the face of the bill, if it is drawn in fact for a debt of the principal. Where the drawer of a bill is an agent of the drawee, it is held in England that he is liable both to the payee and to subsequent parties, although known by them to be acting as agent merely. In the United States a different rule seems to have been laid down, and it has been held that the agent who draws a bill on his principal for goods sold him disclosing the principal, is not so liable to a payee who has knowledge of the agency. But if the agent draws the bill on his principal in his individual name, he will be liable as drawer to the payee and subsequent parties, even though the bill is drawn expressly chargeable to the principal's account, and though the payee knows of the agency."

In Parsons on Notes and Bills, volume 1, page 102, it is said: ²⁷ "It is the general rule in regard to simple contracts that parol evidence may be received to make an unnamed principal liable, or to give them the benefit of the contract, for this leaves the actual party liable as before, and, therefore, cannot be considered as varying the contract. But such evidence cannot be received to discharge the actual signer on the ground of his agency, for this would be to vary the contract. In reference to a negotiable paper, however, the rule, as we have seen, is more strict. For parol evidence is not admissible either to discharge the actual signer or to charge one whose name does not appear on the instrument. The reason for this is that from the nature and purposes of negotiable paper no person should be held as a party to it whose name is not written upon it, as such paper ought to contain in itself its own evidence, and thus be independent of extrinsic proof. One who puts his name on negotiable paper will be liable personally, as we have seen, although he acts as agent, unless he says so and says also who his principal is; that is, unless he uses some expression equivalent to Lord Ellenborough's

language, 'that I am the mere scribe.' For if the construction may fairly be that while he acts officially, or at the request of others, or for the benefit of others, yet if what he does is still his own act, it will be so interpreted."

In Daniel on Negotiable Instruments, volume 1, section 305, it is said: "The party so signing must have intended to bind somebody upon the instrument, and no promisor but himself thereon appearing, it must be construed as his note or as a nullity. And though he term himself agent, such suffix to his name will be regarded as a mere *descriptio personae* ²⁸ or as an earmark of the transaction, and may be rejected as surplusage. And this principle applies, although it can be proven that the payee knew of the agency when the note was made, and it was understood that the principal and not the agent should be bound, for such evidence would vary the terms of the written note. But under such circumstances, if the note were not paid, the principal might be sued upon the original consideration. However, if the payee, with full knowledge of the agency and of the principal's liability, and relying solely on the agent's credit, took his individual note, the principal cannot be resorted to at all. In a late case in New York, the note was signed simply J. S. M., agent. It was alleged to have been given for goods sold by the defendant, a lady, probably the agent's wife, and recovery against the alleged principal was sustained. This decision is in conflict with the general current of authority. The true principle has been thus stated by the United States supreme court. Parol evidence can never be admitted to exonerate an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency, and mentioned the name of his principal at the time the contract was executed."

We have been referred to no decisions of this court applicable to the case at bar. It seems manifest that the decided weight of authority, if indeed there be any authority to the contrary, is that the first paragraph of the answer constituted no defense, except so far as the plea of no consideration was relied on; and, that being true, the testimony as to the agreement or understanding between appellant and appellee that ²⁹ appellee should not be bound on the bills was incompetent and could not authorize a verdict in defendant's favor. We have already seen that there was no proof to sustain the plea of no consideration. It further appears in this case

that the appellant lived in the state of Tennessee distant from the home of the hominy mills, as well as from appellee's residence, and it seems clear that the agreement at the commencement of the business transaction was that appellee should give the checks of the hominy mills on appellant to the persons from whom he purchased corn, and that from time to time he would give his draft to appellant upon the hominy mills for the sums so paid out by the bank on the checks as aforesaid, and it seems certain that appellant for some time relied entirely upon that agreement or contract, and cashed the checks of the hominy mills signed by appellee as agent, without knowing in fact, except from appellee, that he was the authorized agent of the hominy mills. It may seem hard for appellee to pay the debts sued for, but would it not be still harder upon appellant to lose the money which it had advanced relying upon the promise of appellee to do that which in fact he did do, that is, give his own bill in consideration of the money furnished by the bank at his instance and request, although he was merely the agent of the hominy mills.

From the foregoing, it will be seen that the court erred in giving the second instruction complained of. Instruction A asked for by plaintiff should have been given. Instruction B was more favorable to appellee than he was entitled to. Instruction C should have been given. Instructions X and Y asked for by appellee were properly refused.

³⁰ For the reasons indicated the judgment of the court below is reversed, and the cause remanded, with directions to award appellant a new trial, and for proceedings consistent with this opinion.

NEGOTIABLE INSTRUMENTS.—PAROL EVIDENCE, as a rule, is inadmissible to vary the terms of a negotiable instrument: See the note to *Kulenkamp v. Groff*, 15 Am. St. Rep. 287; *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391. For modifications of this rule, see the note to *Harris v. Murphy*, 56 Am. St. Rep. 668, 669; *Witherow v. Slayback*, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681. The maker of a note, with nothing on its face to disclose that he is an agent, cannot exonerate himself from liability by showing that in executing the note he acted only as an agent, and signed it under an agreement with the payee that the principal alone should be bound: *Shuey v. Adair*, 18 Wash. 188, 63 Am. St. Rep. 879, 51 Pac. 388.

PEDIGO v. COMMONWEALTH.

[103 Ky. 41, 44 S. W. 143.]

EVIDENCE AS TO TRAILING WITH A BLOODHOUND of one accused of crime is admissible to connect him therewith only when it is shown by someone having personal knowledge of the fact that the dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination; that he is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings; that such dog was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him.

ARSON.—EVIDENCE that just prior to the discovery of a fire the witness loaned matches to a certain person is inadmissible in a trial for arson, if it is not shown that the defendant was in the company of the person borrowing the matches, and no conspiracy is charged in the indictment.

WITNESSES—IMPEACHMENT.—EVIDENCE of statements made by a witness offered for the purpose of contradicting him is inadmissible, if such statements are neither contradictory to, nor inconsistent with, his testimony upon any material point.

ARSON.—EVIDENCE.—An opinion expressed by a husband to his wife that a third person was a barn-burner is inadmissible upon a trial of such third person for arson.

L. McQuown, for the appellant.

W. S. Taylor and J. Sandidge, for the appellee.

42 DU RELLE, J. Appellant was indicted jointly with Worth Wilson for burning the stock barn of L. W. Preston, on March 10, 1897, and, having been given a separate trial, was found guilty and sentenced to three years' confinement in the penitentiary.

Upon the trial, Preston testified that, at ten minutes of nine in the evening, he discovered the fire coming through the barn from the southwest corner; and that he thereupon "telegraphed to Neighbors, at Elizabethtown, and got his bloodhound, that arrived the next day at noon, and carried him to the rear of the southwest corner of the barn; and the dog took a track and went in a south direction to the ⁴³ lane, and went down the lane three panels, and crossed the fence through the place of Spencer into the street, and then up the street toward the dormitory, and up to the house of Nan Tunstel's, opposite the dormitory. The dog was then taken to the alley that leads out of the street, east from the one on which the dormitory is situated; and the dog took a track then, and followed

it up that street through the plank fence through Mr. Joe Smith's, following a path into the Knob road, out that road to Dolph Depp's gate, crossed the fence in a low place near the gate, and then through the swamp in the field toward my barn that was burned."

After testifying to some other matters, the witness further stated: "Next day, after the fire, witness, following the dog, saw tracks going through Spencer's field; the tracks were about four feet apart, and were the tracks of one person, and looked like person was running, and dog followed that track. Witness stayed from fifty to one hundred yards behind the dog trying to keep the crowd back." This was all the testimony in regard to the dog.

The barn was totally destroyed, together with a lot of horses and other stock and property.

It appears that the dormitory spoken of was situated about five hundred yards toward the center of town from Preston's barn, and was a tenement occupied by a large number of families and individuals, many of whom were of bad repute. Immediately opposite the dormitory, on Front street, was the house of Nan Tunstel, which appears to have been a house of ill-fame. It is admitted that both appellant and his codefendant were at the dormitory and the Tunstel house before and after the fire, in company with Fannie Hogan, ⁴⁴ a lewd woman, whom appellant was in the habit of visiting, and with Pearl Crumpton, another woman of the same class, whom Wilson afterward married.

Lula Simmons, another inmate of the dormitory, testified that, at "about good dark," on the evening of the fire she was getting some mullein for use as medicine in the field back of Preston's barn; that she was just behind the barn, and about seventy-five yards from it, and when she started back she saw appellant come out of the back door and shut the door, and he said to her, "Hello! Lula; you will see a hell of a fire here in a little while"; that he then got over the fence back of the barn, staggering and apparently drunk, and came to where she was; that they walked together out of the field, through Depp's field (which lay in the direction of the dormitory from Preston's) down the lane back of Depp's house that leads down to the pike; that she got over the fence and went on through the field, but that appellant went toward the pike, while she went on back of Spencer's house, through his stable lot, and up the road to the dormitory. As nearly as

can be ascertained from the bill of exceptions (which is quite indefinite as to the locations), the track followed by the dog coincides in some respects, though not in all, with that taken by appellant, according to the statement of the Simmons woman, so far as she claims to have seen his movements.

Two other witnesses testified to having seen, a short time before the fire, two unidentified men at the point in the lane where the dog was set to trailing the second time, and from which point the dog went in the direction of the barn. These witnesses knew both appellant and Wilson, but did not recognize either of the men.

⁴⁵ Alice Cass, another inmate of the dormitory, was permitted to testify that, about three-quarters of an hour before the fire, Wilson came to her room and borrowed some matches; that someone was on the porch with him, but she did not know who it was. There was some testimony of statements by appellant after the fire tending to cast some suspicion upon him.

Preston had testified on redirect examination that he saw Wilson in Louisville, told him there was a reward of two hundred and fifty dollars offered for the man who burned the barn, and that Wilson could have the reward if he would help to get the man, to which Wilson replied, "I am a poor fellow, and hard up, but I would hate to tell who it was, for Walter Pedigo is a good friend of mine." This testimony, of course, should not have been admitted, and was properly excluded from the jury on the day following.

The defense relied on was an alibi. The two women, Fannie Hogan and Pearl Crumpton, testified that appellant and his codefendant, Wilson, were in their company all the evening until the time of the fire, and there was other corroborative testimony to the same effect.

Upon cross-examination, the witness, Hogan, was asked if her husband (she being a married woman) had not said to her in Louisville, in the presence of Policeman Hessian, that she had left him and taken up with a "damned barn-burner," and if she had not replied that her husband would keep on until he got her connected with the barn burning; if Hessian did not ask her who it was that fell over the fence and hurt themselves, and if she had not said, "It was not me, as we run"; and if she had not further said if she talked she ⁴⁶ would get some one into trouble. Having responded in the negative, Hessian was permitted to contradict her and state that the conversation indicated had taken place. She was further asked if

she had not told Preston, in the presence of Bailey, that she would tell him what she knew about the fire if he would not ask her anything about Walter Pedigo, and if she had not told Preston one of the Reynolds boys burned it and got five dollars for it. This was answered in the negative, and Bailey was permitted to testify in regard to the conversation indicated, the court in regard to this testimony—and this only—cautioning the jury that the evidence of Bailey was to be considered only as affecting the credibility of the witness, Hogan.

From the statement of facts it is evident that the most important question is, whether the testimony in regard to the dog and his actions was competent. On behalf of the commonwealth, it was urged that this testimony was admissible for what it was worth as one of the circumstances pointing to the guilt of appellant. On the other hand, it is insisted with great earnestness that while evidence concerning the tracking of human beings by dogs has been sometimes acted upon by mobs, it has never been admitted as competent in the courts of any state except one, and in that one under conditions which did not exist in this case; that if admissible at all, it is admissible solely upon the ground that it is expert testimony, and that no evidence was offered or admitted that the dog in question was qualified, or had been trained to track human beings, or even that he was in fact a bloodhound.

The only cases upon this subject to which we have been ⁴⁷referred, or which we have been able to find, arose in Alabama. In the case of *Hodge v. State*, 98 Ala. 10, 39 Am. St. Rep. 17, 13 South. 385, upon a trial for murder, it appeared that on the night of the killing, just after it was done, several witnesses went to the place and discovered, in close proximity to the house, man tracks. The tracks were sufficiently marked to be easily followed, and were followed by several of the witnesses up to, or very near to, the house of defendant. One of the witnesses, while on the stand, was asked the following question: If he had, at the time he was searching for tracks, a trained dog for tracking a man? Against objection, the witness was permitted to state that he did own such a dog; that when the tracks were discovered near the house of deceased he got his dog and put him on the tracks, and that the dog, after taking the trail, followed the tracks and went to defendant's house, being followed by the witness. Said the court in that case: "It is common knowledge that dogs may be trained to follow the tracks of a human being with considerable certainty and accuracy. The

evidence in this case showed that a dog thus trained was, within a very short time after the homicide, put upon the tracks of the person toward whom all the circumstances strongly pointed as the guilty agent, and that the dog, as if following these tracks, or 'trailing,' went to the house of the defendant."

There was other evidence showing that measurements were made of the tracks at various points along the route, and they were identified at each point as having been made by the same shoes as were the tracks at the place of the murder; and it was held that: ⁴⁸ "The fact that the dog, trained to track men as shown in the testimony, was put on the tracks at the scene of the homicide, and, 'taking the trail,' so to speak, went thence to defendant's house, where he, the defendant, is shown to have been that night after the killing, was competent to go to the jury for consideration by them in connection with all the other evidence as a circumstance tending to connect the defendant with the crime."

In a subsequent case in the same court (*Simpson v. State*, 111 Ala. 6, 20 South. 573), upon a trial for arson, there was evidence introduced tending to show that the defendant was tracked by bloodhounds which had been put upon his track a short time after the building was burned. The owner of the dogs (which were known as bloodhounds) testified that he had trained them to track human beings, and that they would not leave the track of a person, after they had been once put upon it, to follow another track. On cross-examination, an attempt was made to weaken the effect of this testimony by asking the trainer and owner of the dogs if he had not trained certain bloodhounds kept at another place, of the same stock and breed as the dogs concerning which he had testified, close on to two years old, and if he did not know that they had recently been put on a human track, and had quit the track and gone off and killed a sheep. In this case the court held: "The court properly excluded from the jury the proposed evidence as to two bloodhounds, of the same breed of those employed to track the supposed criminal in this case, and trained by the same man, being put upon the trail of a human being, and leaving it to trail a sheep, which they overhauled ⁴⁹ and killed. The test by comparison was not sufficiently certain to determine the reliability of the dogs employed here by reference to the qualities of the other dogs."

It is difficult to lay down a general rule as to the introduction of testimony of this kind. It is matter of common knowledge, of which courts are authorized to take notice, that dogs of some

varieties (as the bloodhound, foxhound, pointer, and setter) are remarkable for the acuteness of their sense of smell, and for their power of discrimination between the track they are first laid on and others which may cross it; but it is also matter of common knowledge that all dogs do not possess this power in the same degree, and that some dogs of purest pedigree prove worthless upon trial. It is stated in the Encyclopedia Britannica, title "Dog," that: "The bloodhound, regarded by many as the original stock from which all the other varieties of British hounds have been derived, is now rarely to be met with in entire purity. Its distinguishing features are long, smooth, and pendulous ears, from eight to nine inches in length, full muzzle, broad breast, muscular limbs, and a deep sonorous voice. The prevailing color is a reddish tan, darkening toward the upper part, and often varied with large black spots. It stands about twenty-eight inches high." It is stated in Webster that the bloodhound was formerly used for pursuing runaway slaves, and that "other varieties of dog are often used for the same purpose and go by the same name. The Cuban bloodhound is said to be a variety of the mastiff."

After a careful consideration of this case by the whole ⁵⁰ court, we think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him. When so indicated, testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial court should exclude the entire testimony in that regard from the jury. It is well known that the exercise of a mysterious power not possessed by human beings begets in the minds of many people a superstitious awe, like that inspired by the bleeding of a corpse at the touch of the supposed

murderer, and that they see in such an exhibition a direct interposition of divine providence in aid of human justice. The very name by which the animal is called has a direct tendency to enhance the impressiveness of the performance, and it would be dangerous in the extreme to permit the introduction of such testimony in a criminal case under conditions which did not fully justify its ⁵¹ consideration as a circumstance tending to connect the accused with the crime. In this case there was no testimony showing that the dog had been trained or tested.

As the case must therefore be reversed and sent back for a new trial, we will consider the other alleged errors for which a reversal is sought. The testimony of Alice Cass as to the borrowing of the matches seems to us, while not particularly material, to be hardly sufficiently connected with this appellant, as there is no direct testimony to show that appellant was in Wilson's company at the time, and this the more as the indictment does not charge conspiracy.

As to the questions asked on cross-examination of Fannie Hogan, the answers to which various witnesses for the commonwealth were permitted, against objection, to contradict, we are of opinion that the statements proved by Hessian, Preston and Bailey were not contradictory of, or inconsistent with, her testimony in chief upon any material matters, and were therefore incompetent. The opinion of the witness Hogan's husband that appellant was a barn-burner was clearly incompetent: *Kennedy v. Commonwealth*, 14 Bush, 357; *Loving v. Commonwealth*, 80 Ky. 511; *Stephens' Digest of Evidence*; see 7 *Am. & Eng. Ency. of Law*, 109. And we think the other statements of these witnesses in contradiction of the witness Hogan were as to matters collateral to the testimony in chief of the witness, and therefore irrelevant.

For the reasons stated, the judgment is reversed and the cause remanded, with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

MR. JUSTICE GUFFY DISSENTED, and said: "I concur in the reversal of the judgment in this case, but dissent from so much of the majority opinion as holds that the trailing or proven trailing of the defendant by a bloodhound can be introduced as evidence upon the trial of such person charged with any crime. It is true that the majority opinion so restricts such proof and requires so many conditions precedent that if the opinion in question should be strictly adhered to no great injustice would very often result from evidence admitted under the ruling in question. It, however,

seems to me, with due respect to the majority opinion, that such a rule of evidence is contrary to all other rules of evidence, and if not in violation of the letter of the constitution, is manifestly in violation of the spirit as heretofore expounded by this court. Such a rule seems to me an innovation upon all the heretofore established rules of testimony. The use of bloodhounds was, perhaps, necessary to efficiently and effectually uphold the institution of slavery, as well as to aid in the arrest and capture of persons accused of crime in the dark ages. In such cases, however, the object sought was the arrest and capture of known fugitives. If the dog, in fact, took up and followed the trail of a fugitive and found him, or aided his pursuers to find him, the object was accomplished, and there could be no mistake as to whether he was the party sought or not; his guilt and right of capture having been theretofore established, and, in fact, being unquestioned. If the hound took the wrong trail and brought to bay the wrong party, that fact would be ascertained so soon as the pursuers reached the party, and the utility of the hound in that regard then ceased. It is now proposed to use the hound, not to capture a fugitive, but to ascertain or furnish evidence to convict some citizen of crime. It seems to me that this new use of the bloodhound is a radical departure from the former purposes for which they were used; but whether this be so or not, it seems to me that neither the life nor liberty of a citizen should be taken away, or even jeopardized by the mere fact that some person testified that the hound was well trained to track human beings, etc., and that he had trailed the accused from the scene of the crime to the habitation of the accused, or until he came upon the accused party.

"I do not think that the evidence as to what the hound said or indicated should ever be admitted as testimony, for the further reason that there is too much danger of an innocent person being convicted, or at least arrested and permanently disgraced by the admission of such testimony. This case illustrates the danger alluded to. From the evidence in this case it is highly probable that quite a number of persons went that very night to the dormitory, or to the house opposite the dormitory, and if they happened to pass by or near the barn the dog of necessity was as apt to take one trail as another, and hence there would be no sort of certainty in his trailing the criminal, if any there was.

"Such evidence should not be permitted, for the reason that the defendant is not permitted to cross-examine the witness, who in reality is the dog, whether he is the legal witness or not. I am aware that it has been held that you could prove dying declarations against the defendant, and it has been said that he has the constitutional privilege of meeting the witness face to face, because the party testifying is the one who is reciting the dying declarations, but the admission of the statement or trailing by the hound

is not a parallel case. The trailing of the hound, if evidence at all, must be upon the supposition that he took the track at the scene of the crime and followed it, but the defendant has no chance to inquire of the hound how far from the place did he really find the trail, or did he cross any other or find any others. If a person was testifying to having tracked the defendant from or about the place, he could be cross-examined upon that subject to know whether there was any other track, and which appeared to be the freshest, and size, and whether the trail he was following crossed or fell in with other trails. Not so with the dog. He has had his say and left. There is another familiar rule of law, that A, a witness, will not be allowed to testify that B told him that he saw the defendant at the place, or that he trailed him or saw him going from the scene of the crime; but it seems to be contended in this case that A may tell what the dog said about it. A person may be murdered in a highway or road that is rightfully traveled by numerous persons; twenty-five or fifty persons may have passed within less than a dozen hours, and upon the discovery of the crime a bloodhound may be brought there, and, if he has any of the attributes which he is generally credited with, he will certainly find some trail, and land somewhere. Would it be right to allow that fact to be proven against the party accused of the murder? If such evidence be admitted, it seems to me that a man might in fact be hung without any other evidence than the mere fact that the bloodhound was proven to have taken up the trail at the scene of the murder and followed it to the house of the defendant. Such evidence must tend to establish his guilt, else it could not be admitted, and if the jury upon such evidence found him guilty, how could this court reverse? It will not do to say that the jury will not convict a party upon such testimony. As matter of fact and common history, some party is very likely to be suspected of the crime, and after suspicion to a greater or less extent permeates the community, but little additional evidence is required to convict the accused, especially if he be defenseless or destitute of friends and facilities for making a defense.

"It seems that if the conditions described in the opinion were complied with, the fact that the hound trailed a person from the scene of the crime would be sufficient to authorize a warrant of arrest, and would be such probable cause as to protect the party procuring the arrest, and thus a citizen might be put to great expense, mortification, and disgrace without any evidence at all against him, except the trailing of the hound, and have no redress for any of the wrongs so inflicted. As before intimated, it seems to me that the use of the bloodhound properly belonged to the days of slavery and of the bloody criminal code of the dark ages, and, inasmuch as the institution of slavery and the code aforesaid have ceased to exist, the hound should be relegated to innocuous desuetude."

Evidence of Trailing Persons by Bloodhounds.

The cases upon this topic are very scarce, and their reasoning very superficial and unsatisfactory. So far as the adjudicated cases go, however, they are unanimous in holding that under certain conditions and with some restrictions evidence of the trailing of an alleged criminal by bloodhounds may be permitted to go to the jury in connection with the other evidence, as a circumstance tending to connect the defendant with the crime of which he is accused. Thus, in *State v. Hall*, 1 Ohio L. D. 147, 3 Ohio N. P. 125, it was held that evidence that a bloodhound, within twenty-four hours after the commission of a burglary was put upon the scent of a person at the building entered, or at the place where the property was found concealed, and, as if following such scent, went to the defendant's house and stopped at his door, is competent to go to the jury as a circumstance tending to connect the defendant with the crime. In this case the court said: "In such cases full opportunity should be given to inquire into the breeding and testing of the dog, and to all the circumstances attending the trailing in the case on trial, and to the manner in which the dog then acted and was handled by the person having it in charge. The weight to be given to the tracking as evidence against the accused will depend largely upon these matters": *State v. Hall*, 3 Ohio N. P. 125. In the case of *Hodge v. State*, 98 Ala. 10, 39 Am. St. Rep. 17, 13 South. 385, the sole question before the court for its consideration and determination was the topic under consideration, and the court there decided that what the dog did was admissible, although no cases were cited by either court or counsel. The court said, through Mr. Justice McClellan, delivering the opinion, that "it is common knowledge that dogs may be trained to follow the tracks of human beings with considerable certainty and accuracy. The evidence in this case showed that a dog thus trained was within a very short time after the homicide put upon the tracks of the person toward whom all the circumstances strongly pointed as the guilty agent, and that the dog, as if following these tracks or 'trailing,' went to the house of the defendant. It was also in evidence, by several witnesses, that the tracks found at the scene of the homicide were followed by them thence to the house of the defendant, being measured at various points along the route, and otherwise, at each of such points, identified as being made by the same shoes as were the tracks at the place of the murder, and that the route thus traced by them was precisely that taken by the dog throughout. On this state of case, we are of the opinion that the fact that the dog, trained to track men as shown in the testimony, was put on the tracks at the scene of the homicide, and, after taking the trail, so to speak, went thence to the defendant's house, where he, the defendant, is shown to have been that night after the killing, was competent to go to the jury for consideration by them, in connection with all the other evidence,

as a circumstance tending to connect the defendant with the crime, and of consequence that the court committed no error in refusing to exclude it." In *Simpson v. State*, 111 Ala. 6, 20 South. 572, evidence was introduced by the state in a trial for arson tending to show that defendant was tracked by bloodhounds, which were put upon his track a short time after the building was burned. The owner of these dogs testified that he had trained them to track human beings, and that they would not leave the track of a human being after they had once been put upon it to follow another track. No objection seems to have been made to the admission of this evidence, but the witness was asked on cross-examination whether or not other bloodhounds, trained by him and of the same stock, had been put upon a human track and had left it and caught a sheep. This question was excluded by the trial court over objection, and the appellate court, in passing upon the question, said: "The court properly excluded from the jury the proposed evidence as to two bloodhounds of the same breed as those employed to track the supposed criminal in this case and trained by the same man, being put upon the trail of a human being and leaving it to trail a sheep, which they overhauled and killed. The test by comparison was not sufficiently certain to determine the reliability of the dogs employed here by reference to the qualities of the other dogs": *Simpson v. State*, 111 Ala. 6-10, 20 South. 572.

HOSKINS v. CRABTREE.

[103 Ky. 117, 44 S. W. 434.]

CONSTITUTIONAL LAW—TITLE OF ACT.—Legislation regulating the right of a wife in her deceased husband's estate, either real or personal, may constitutionally be enacted either under the title of "Husband and Wife" or "Descent and Distribution."

CONSTITUTIONAL LAW—TITLE OF ACT.—An act entitled "An act to amend an act entitled An act relating to 'husband and wife,' changing the right of a widow in her deceased husband's personalty," is germane to the title, although that subject theretofore has been provided for and treated of under the head of "descent and distribution."

Petree & Downer and E. W. Hines, for the appellant.

C. H. Bush and W. G. Bullitt, for the appellees.

120 HAZELRIGG, J. It is the contention of the appellants that the act of March 15, 1894, entitled "An act to amend and re-enact article three (3) of an act entitled, 'An act relating to and entitled, Husband and Wife,' approved May 16, 1893,"

is unconstitutional in so far as it provides that the widow shall have an absolute estate in one-half of the surplus personalty left by her deceased husband, and that this is so because, without reference to the act relating to descent and distribution, under which title this subject has always been provided for in our law, the amendment in question materially affects the law of descent and distribution. And that its title is deceptive and misleading because it purports to be an amendment merely of the act relating to husband and wife, under which title the question of the rights of the surviving wife and children are not and never have been regulated.

We think it manifest, however, that legislation regulating the rights of the wife in the deceased husband's estate, real or personal, may constitutionally be under either the title of "Husband and Wife," or "Descent and Distribution," and therefore the amendment found in section 2132 of the Kentucky Statutes is germane to the title of the act and is constitutional. Under it, the widow is entitled in any event to an absolute estate in one-half of the surplus personalty left by her husband, and not merely to one-third if the intestate leave issue, and one-half if he leave no issue, as is provided in the law of descent and distribution.

¹²¹ Nor do we think it possible to reconcile the two conflicting provisions by construing the act of March 15, 1894, as giving the widow one-half the surplus personalty only when there are no children.

Such a construction would do violence both to the language and to the manifest intention of the law makers.

The judgment below conforms to these views and is therefore affirmed.

TITLE TO STATUTES.—THE CONSTITUTIONAL REQUIREMENTS as to the titles of statutes are considered at length in the monographic notes to *Bobel v. People*, 64 Am. St. Rep. 70-107; *Crookston v. County Commrs.*, 79 Am. St. Rep. 456-486. See especially this last cited note, pages 480-486, on the sufficiency of titles to amendatory statutes.

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WILSON v. MILLIKEN.

[103 Ky. 165, 44 S. W. 660.]

ABATEMENT OF ACTIONS—STATE AND NATIONAL COURTS.—The pendency of an action in a national court held for the same state and within the same territory, may be pleaded in abatement of a subsequent action between the same parties commenced in a state court for the same subject matter and seeking the same kind of relief. In such case the jurisdiction of the two courts is domestic, and not foreign to each other.

ABATEMENT OF ACTIONS—DISMISSAL OF FORMER SUIT PENDENTE LITE.—The objection of a former suit pending is removed by its dismissal or discontinuance, even after plea in abatement in a second suit, unless the latter is brought for vexatious purposes.

M. B. Gifford and Abbott & Rutledge, for the appellant.

Barnett, Miller & Barnett, for the appellee.

166 WHITE, J. This action was brought by appellant for damages for nineteen hundred dollars claimed for an injury. The petition was filed August 22, 1895.

Appellee filed an answer which develops the fact that this same appellant had theretofore brought an action for the identical same injury in the Jefferson circuit court, claiming damages in the sum of five thousand dollars, and that this first case had on petition been transferred to the United States circuit court by appellee, and that this suit, in the United States circuit court, at the date of filing the answer, was then pending and undetermined in the circuit court for the United States, for the district of Kentucky, and at Louisville, Jefferson county.

There are other defenses pleaded in the answer, but as the case was determined by the court below on the sufficiency of this plea in abatement, the other defenses pleaded need not be stated. To this plea of another suit pending, as well as to the whole answer, appellant replied. That part affecting this plea is an admission that at the date of filing the answer there was another suit pending in the United States circuit court, but same had been dismissed and is not now pending.

Appellee demurred to the third paragraph of appellant's reply, being that portion that replies to the plea in abatement. The court, on a trial of this demurrer, sustained same, and appellant amended this paragraph of the reply, **167** and again a demurrer was submitted to the reply as amended, which the court sustained, and the appellant declining to plead further, the court

dismissed the petition. From that judgment this appeal is prosecuted.

The reply as amended, to which a demurrer was sustained, admitted that, at the date of filing the plea in abatement, there was then existing and undetermined another suit for the same cause of action, in the United States circuit court for the district of Kentucky, which case was originally brought in the Jefferson circuit court, and by petition of appellee transferred to the federal court.

The question presented is, Was that a bar to this action?

It is conceded by counsel for appellant, in his brief, that if the United States circuit court for the district of Kentucky is to be treated as the state circuit courts, or as domestic courts, that the plea in abatement as filed is sufficient, but, on the other hand, contends that the circuit court of the United States sitting for the district of Kentucky is to be treated as a foreign jurisdiction like the courts of the other states, and that, therefore, the plea in abatement filed is in itself insufficient.

This question has never been passed on by this court, so far as we have been able to find.

In the case of *Gordon v. Gilfoil*, 99 U. S. 169, the supreme court of the United States, by Justice Bradley, after deciding that the action in the federal circuit court was not the same as in a former action in the state circuit court, and overruling the plea in abatement filed in the United States circuit court on that ground, proceeds: "It may be proper here also to observe, although the point ¹⁶⁸ was not pressed in the argument, that the exception to the jurisdiction to the circuit court is destitute of foundation. The suggestion was, that as the proceedings in the order of seizure and sale were still pending in the district court, the debt could not be prosecuted in the circuit court of the United States. But it has been frequently held that the pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a federal court. What effect the bringing of this suit, *via ordinaria*, may have had on the order of seizure and sale it is not necessary to determine. It is possible that it superseded it. But the pendency of that proceeding when the suit was commenced cannot affect the validity of the proceedings in this suit, nor the jurisdiction of the court in respect thereof."

In the case of *Pierce v. Feagans*, 39 Fed. 587, the United States circuit court for the eastern district of Missouri, Thayer, J., says: "Again, the suit in the state court is pending in a

different jurisdiction. It is now well settled that the pendency of a suit in a state court cannot be taken advantage of by way of a plea of *lis pendens*, to defeat a suit of the same nature, and between the same parties, in the federal courts. The two courts, though not foreign to each other, belong to different jurisdictions in such sense that the doctrine of *lis pendens* is not applicable": Citing *Gordon v. Gilfoil*, 99 U. S. 169; *Stanton v. Embrey*, 93 U. S. 554; *Sharon v. Hill*, 22 Fed. 28, 10 Saw. 394.

The case of *Stanton v. Embrey*, 93 U. S. 554, cited by Thayer, does not support his opinion. In that case the action ¹⁶⁹ was brought in the supreme court of the District of Columbia, and the defendant pleaded in abatement the pendency of a former action for the same demand between the same parties in a court of the state of Connecticut. The precise question before the court was whether the pendency of an action in the state court of Connecticut was a bar to a subsequent action begun in the supreme court of the District of Columbia. The court there held that such action in the court of the state of Connecticut was not a bar to that action in the supreme court of the District of Columbia, citing, among others, *Salmon v. Wooten*, 9 Dana, 422, and *Davis v. Morton*, 4 Bush, 444, 96 Am. Dec. 309.

In the case of *Hughes v. Elsher*, 5 Fed. 263, in the United States circuit court for the district of New Hampshire, the court, by Lowell, C. J., said: "The pendency of the bill is pleaded in abatement. The plaintiff makes three objections to the plea, all of which must prevail: 1. It does not appear there is an action pending elsewhere; . . . 3. That the pendency of an action in a state court within this circuit is not ground for abating one in this court is entirely settled by authority."

In the case of *Latham v. Chafee*, 7 Fed. 520, before the United States circuit court for the district of Rhode Island, Colt, D. J., with Lowell, J., concurring, said: "The main question which arises upon the defendant's plea is whether the pendency of a suit in a state court between the same parties, and involving the same subject matter, can be pleaded in abatement, or in bar, to a suit in the circuit court of the United States. It is undoubtedly true, as a general rule, that as between two courts of concurrent ¹⁷⁰ jurisdiction, that which first gets control of the litigation will be allowed to prosecute it to an end; and that, consequently, the pendency of another prior suit between the same parties, and involving the same subject matter, may be pleaded in abatement of a subsequent suit in another court. But this rule does not extend to courts of foreign juria-

diction. It has been often held that the courts of a state are foreign, in this sense, to the courts of the United States": Citing *Gordon v. Gilfoil*, 99 U. S. 169; *Stanton v. Embrey*, 93 U. S. 554.

In the case of *Sharon v. Hill*, 22 Fed. 28, 10 Saw. 394, in the circuit court of the United States for the district of California, Sawyer, J., says: "An alleged valid and subsisting contract is, therefore, the basis and cause of one suit, and forgery and fraud the basis and cause upon which the other rests. These, certainly, do not constitute the same causes of suit. The causes of suit are clearly not identical. It is also bad on another ground, that the suit set up is not pending in a court of the same jurisdiction. It is well settled by the supreme court of the United States that a suit pending in another jurisdiction for the same cause cannot be pleaded in abatement in a suit in the United States courts, and that the courts of the states and of the United States are courts of different jurisdictions: *Stanton v. Embrey*, 93 U. S. 548-558; *Gordon v. Gilfoil*, 99 U. S. 169-178. Here are two jurisdictions—jurisdictions of two distinct governments. One is state jurisdiction, and the other is the jurisdiction of a national court. If it were a fact that a suit is pending for the same cause in the state court, a court of a different sovereign jurisdiction, it would not abate the suit here. The ¹⁷¹ plea is bad in substance on that ground, and this objection is taken in the replication."

In the case of *Washburn etc. Mfg. Co. v. Scutt*, 22 Fed. 710, in the circuit court of the United States for the western district of Pennsylvania, Atcheson, J., said: "The jurisdiction of the court of common pleas is contested on the ground that in the suit therein service was made on a mere employé of the corporation, who, it would seem, is not an agent within the meaning of the state statute relating to service of judicial process upon corporations, but, should that court hold the service to be good, still the present plea could not prevail for several reasons. In the first place, Isaac L. Ellwood, a plaintiff here, and properly so, as it seems to me, is not a party to the suit in the common pleas. Again, the object of that suit is the rescission of the license contracts, whereas the purpose of this suit is the enforcement thereof. Clearly, the relief here sought is not attainable in the former suit. . . . Finally, it has been held that the pendency of a prior suit in a state court is not a bar to a suit in a circuit court of the United States, although between the same parties and for the same cause of action: *Stanton v. Em-*

brey, 93 U. S. 548; Gordon v. Gilfoil, 99 U. S. 168; Sharon v. Hill, 22 Fed. 28, 10 Saw. 394. The plea must therefore be overruled, with leave to the defendant to answer within thirty days, and it is so ordered."

In the case of Oneida Co. Bank v. Herrenden, 101 N. Y. 173, 4 N. E. 332, the court of appeals of New York held that an action begun in the state court and by one defendant, the only one before the court, transferred to the United States circuit court, could not be plead in abatement ¹⁷³ to a second action begun in the state court on the same cause of action against another defendant.

In the case of Kilpatrick v. Kansas City etc. R. R. Co., 38 Neb. 620, 41 Am. St. Rep. 741, 57 N. W. 664, the supreme court of Nebraska approves Gordon v. Gilfoil, 99 U. S. 168, by saying: "The mere pendency in the courts of another jurisdiction of an action between the same parties, and concerning the same subject matter, cannot be successfully pleaded in bar or abatement": Citing Gordon v. Gilfoil, 99 U. S. 168; Stanton v. Embrey, 93 U. S. 548; Sharon v. Hill, 22 Fed. 28, 10 Saw. 394.

As to the converse of the proposition decided by the above authorities, we find that in the case of Earl v. Raymond, 4 McLean, 233, Fed. Cas. No. 4243, in the United States circuit court for the seventh circuit, Michigan, that court says: "That the pendency of a former suit, in a court having jurisdiction of the same, may be pleaded in abatement, is a principle well established. It is so held to prevent a multiplicity of suits being brought for the same cause. To tolerate the pendency of several suits at the same time for the same cause would be a reproach to the administration of justice. Courts of justice were instituted to afford speedy and effectual remedies for the redress of wrongs, and not to afford a litigious person the means of oppression. . . . It may be laid down as a general rule of action for the federal and state courts that whichever shall first take jurisdiction of a case, the jurisdiction of the other may be defeated by a plea in abatement. And to avoid a conflict between the ministerial officers of the federal and state courts, the officer who first levies his execution is entitled to a preference, the same as where both executions emanate from the state court or courts."

¹⁷³ In the case of Nelson v. Foster, 5 Biss. 44, Fed. Cas. No. 10,105, in the United States circuit court, district of Wisconsin, the court said: "The objection that a suit pending in a court of the state is not the subject of a plea in abatement in

this court is not tenable. By the eleventh section of the act to establish the judicial courts of the United States, it is provided that the circuit courts shall have original cognizance, concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. It is too well settled by the courts of the United States to require citation of authority that in all cases when courts have concurrent jurisdiction, the court which first has possession of the subject must determine it conclusively, and has exclusive jurisdiction. In this case, there were two attachments of the defendant's property, and two writs served on them, and two suits pending against them at the same time. If such a proceeding were sanctioned, it would lead to great oppression, and would be a reproach to the administration of justice. A party has his choice of jurisdictions, but he cannot claim both at the same time. This court has always adhered to the rule not to entertain jurisdiction of a case when we are informed by a plea in abatement that a prior suit in law or equity for the same subject matter, between the same parties, is pending in a court of the state; and such, I have no doubt, is the rule in every court in the United States. This court is not a foreign court to the courts of the state."

In the case of *Radford v. Folsom*, 14 Fed. 97, in the circuit court for the United States, in southern district of ¹⁷⁴ Iowa, the court, through Shiras, D. J., with McCrory, C. J., and Love, D. J., concurring, say: "But it is urged that while the second of the rules as above given may be applicable to cases pending in courts of the same state, yet it is inapplicable when one case is pending in the state court and the other in the federal courts for the same state, the argument being that the two jurisdictions are foreign to each other, and hence that the pendency of a suit in one court cannot be pleaded in abatement of a suit in the other. It is true that the state and federal tribunals owe their origin to different sources, but when created and brought into action within the same territorial limits, can it be fairly said that there are two states or jurisdictions co-existing within the same limits, and yet foreign to each other, in the sense that Iowa is foreign to New York? The same statutory and common law is enforced by both tribunals, and it cannot be said that, if a party is relegated to the state court for the enforcement of his rights, that he is thereby sent into a foreign state or country, whose laws and modes of proceedings

are unknown or unfamiliar. As we have already shown, the main purpose of the rule allowing the pendency of one action to be pleaded, under given circumstances, in abatement of a second, is to prevent a defendant from being unnecessarily harassed and subjected to additional costs by two proceedings when one will fully protect all the rights of the plaintiff."

Now, it is apparent that the cost and vexation caused to the defendant by the institution of the second suit is, to say the least, not lessened by the fact that it is brought in the federal while the first is pending in the state tribunal. The ¹⁷⁵ evil to be remedied is not obviated by the fact that the two proceedings are pending in tribunals owing their origin, the one to the state, the other to the federal, government, yet acting within the same territorial limits.

If it appears that the two proceedings, being between the same parties, and for the enforcement or protection of the same rights, will result in the granting of the same remedy, operative within the same territorial limits, then it would seem clear that the second is not needed to protect or enforce the plaintiff's rights, and as the defendant must, of necessity, be put to additional trouble and expense in defending the second action, it follows that he is thereby vexatiously harassed and, in such case, he should be enabled to protect himself by causing the abatement of the second action. It is the duty alike of the state and the United States court to protect a defendant from unnecessary and vexatious litigation. If the first action is brought in the state and the second in the federal tribunal, or vice versa, it is the bringing of the second action that constitutes the oppressive and unnecessary act on part of plaintiff, and the corrective should be applied in the court whose jurisdiction is invoked oppressively and wrongfully. Again, the fact that one action is pending in the state and the second in the federal court, instead of being a reason why the second should not be abated, is, on the contrary, a weighty argument for just the opposite conclusion; for, if the two proceedings are allowed to proceed at the same time, there may arise all the difficulties from a conflict between the two jurisdictions, acting "within the same state."

The question here presented is an entirely new one in Kentucky, ¹⁷⁶ and because of that we have given the matter considerable attention.

It will be noticed that in the case of *Gordon v. Gilfoil*, 99 U. S. 169, it was not necessary to a decision of that case to

determine whether the federal and state courts were foreign to each other, and, consequently, whether a plea of a former action pending in one court was sufficient in bar in the other court. The supreme court there expresses an opinion in that regard, but it could not be held to be authoritative.

The case of *Stanton v. Embrey*, 93 U. S. 554, though frequently cited in support of the doctrine that state and federal courts are foreign, so that a plea of a former action pending in one court is not good in the other, that case in our opinion does not so hold. The two courts compared were the supreme court of the District of Columbia, and a court of the state of Connecticut. Not only a state and federal court, but sitting in entirely different jurisdictions, neither could enforce process within the other's territory.

Upon these two cases, *supra*, the cases of *Pierce v. Feagans*, 39 Fed. 587, *Hughes v. Elsher*, 5 Fed. 263, *Latham v. Chafee*, 7 Fed. 520, *Sharon v. Hill*, 22 Fed. 28, 10 Saw. 394, and *Washburn etc. Mfg. Co. v. Scutt*, 22 Fed. 710, all in the federal courts, and *Kilpatrick v. Kansas City etc. R. R. Co.*, 38 Neb. 620, 41 Am. St. Rep. 741, 57 N. W. 664, all depend for their authority, and in no case do we find it reasoned out why it should be held that a state and federal court are foreign to each other, so that a plea of a former action may not bar a subsequent action in the other court. An examination of all these cases shows that ¹⁷⁷ the cases that so hold were decided upon the authority of the dictum of Mr. Justice Bradley.

It seems to us that the jurisdiction of the state courts and United States circuit courts held for the states and within the same state are domestic.

Can it be said that the act of Congress providing for removal of cases from the state to the federal courts authorizes a transfer to a foreign jurisdiction? We think not.

Can it be said that the federal court held at Louisville, Kentucky, is foreign in jurisdiction to the circuit courts sitting in Louisville, Kentucky? The same laws are administered, the process of each court covers in part the same territory, and the law expressly authorizes certain cases to be transferred from one court to the other. Most assuredly, they are not foreign.

It seems to us that the reasoning in *Radford v. Folsom*, 14 Fed. 97, *supra*, is unanswerable.

It appears that learned counsel for appellant conceded this to be true in the court below. When the plea in abatement

was filed, they did not demur, but treating that as sufficient in law, unless avoided, filed a reply.

This reply, in effect, admits that when the answer was filed there were two actions pending for the same cause, one in the United States circuit court, and the other in the state circuit court, and it was pleaded in avoidance of this plea of former action that at that time, when the reply was filed, the action in the United States circuit court had been dismissed absolutely, and that there was then but one action.

Under the old rule of pleading, this reply was bad on demurrer, ¹⁷⁸ there was no replication to a plea of former action pending, but nul tiel record, and while we recognize that this rule has been followed in Kentucky in recent years, we think that to apply it in all cases would be unjust. The more modern rule seems to be that the objection of a former suit pending is removed by its dismissal or discontinuance, even after plea in abatement in the second suit: *Warder v. Henry*, 117 Mo. 530, 23 S. W. 776; *Trawick v. Martin Brown Co.*, 74 Tex. 522, 12 S. W. 216; *Grider v. Apperson*, 32 Ark. 332; *Findlay v. Keim*, 62 Pa. St. 112; *Moorman v. Gibbs*, 75 Iowa, 537, 39 N. W. 832; *Nichols v. Bank*, 45 Minn. 102, 47 N. W. 462, and numerous others.

We think this a more just and reasonable rule, and so hold to be the law, but we would not be understood as holding this to be inflexible and to be applied in all cases. The reason of the rule in the beginning that a plea of former action pending would abate the second action is just as good to-day as when the rule was adopted, i. e., that vexatious litigation would not be permitted, and if it appears that the second action was brought for the purposes of vexation, rather than to seek legal rights, the plea should be sustained. By permitting a reply to avoid the plea of a former action, the court ought to be able to ascertain the true reason of the second action, and, if it appear vexatious, abate it. In the case at bar, it appears that appellant selected his forum to try his action, and that appellee, exercising his right, removed the case to the United States circuit court. Appellant then was given his election to follow the case to the United States circuit court or dismiss and again bring his action in the state court for less than two thousand dollars. He chose the latter, but, if he waited to dismiss before he ¹⁷⁹ brought his second action, it would be barred by limitation. So he chose to surrender three thousand dollars of his claim in order to try in the state court, and at the first time he

could do so he appeared in the United States circuit court and dismissed his action. It seems he was notified that appellee would ask the United States court to require him to elect.

This election was had by a dismissal of the action where the larger sum in damages was claimed. It does not appear to have been vexatious.

For these reasons, we are of opinion that the demurrer to the reply to the plea of former action should have been overruled and the reply adjudged sufficient. Upon sustaining the demurrer to the reply, the court dismissed the action, which, following the former action, was error.

Wherefore, the judgment is reversed and cause remanded, with directions to overrule demurrer to the reply and for further proceedings, Judge Du Relle agreeing in reversal, but disagreeing on the reasoning.

MR. JUSTICE DU RELLE DISSENTED from so much of the opinion as held that in a suit in a state court the pendency of a suit in a national court, in and for the same territory, between the same parties and concerning the same subject matter, can be pleaded in abatement. He stated it as his opinion that "the courts of the state and of the United States, though sitting in the same district and having concurrent jurisdiction of the matter in controversy, are courts of foreign jurisdiction to each other, in respect to pleading in one a *lis pendens* in the other, It has been held almost uniformly that the courts of one of the states are for this purpose foreign to those of another. As between the state and national courts, there has been more contrariety of opinion, but the uniform tendency of the later cases in the United States circuit court, circuit courts of appeal, and the supreme court has been in support of the views here expressed": Citing *Gordon v. Gilfoil*, 99 U. S. 169, and *Sharon v. Hill*, 22 Fed. 28, 10 Saw. 394.

Abatement of Action in State Court by Prior Action in National Court and in National Court by Prior Action in State Court.

Although there is undoubtedly some conflict, the decided weight of authority, as well as the trend of all modern adjudication, with the exception of the principal case, is unquestionably in favor of the doctrine that the pendency of a suit in a national court is no defense to, and cannot be pleaded in abatement of, a suit in a state court between the same parties, for the same subject matter, and seeking the same kind of relief, and that under similar conditions, the pendency of an action in a state court is no ground for the abatement of an action in a national court. Under the decision of the great majority of the authorities, it seems to make no difference whether the two courts are sitting in different states, or whether they are held for the same state and within the same

territory. or whether such courts are to be considered foreign to each other or not. Among the cases from the national courts which hold that the pendency of proceedings in a state court cannot be pleaded in abatement of an action in a national court, we cite the following: *Mercantile Trust Co. v. Lamoille Valley R. R. Co.*, 16 Blatchf. 324, Fed. Cas. No. 9432; *Andrews v. Smith*, 19 Blatchf. 100, 5 Fed. 833; *Chamberlain v. Eckert*, 2 Biss. 124, Fed. Cas. No. 2576; *Scottish-American Mortgage Co. v. Follansbee*, 9 Biss. 482, 14 Fed. 125; *Union Mut. Life Ins. Co. v. University of Chicago*, 10 Biss. 191, 6 Fed. 443; *In re Bininger*, 7 Blatchf. 168, Fed. Cas. No. 1419; *Campbell v. Emmerson*, 2 McLean, 30, Fed. Cas. No. 2357; *Certain Logs of Mahogany*, 2 Sum. 589, Fed. Cas. No. 2559; *Wadleigh v. Veazie*, 3 Sum. 165, Fed. Cas. No. 17,031; *Weaver v. Field*, 4 Wood, 152, 16 Fed. 22; *Loring v. Marsh*, 2 Cliff. 311; Fed. Cas. No. 8514; *Stewart v. Chesapeake etc. Canal Co.*, 4 Hughes, 41, 1 Fed. 361; *Sharon v. Hill*, 10 Saw. 394, 22 Fed. 28; *Parsons v. Greenville etc. R. R. Co.*, 1 Hughes, 279, Fed. Cas. No. 10,776; *Greenwood v. Rector*, Hemp. 708, Fed. Cas. No. 5792; *Union Bank v. Varden*, 18 How. 503; *Hyde v. Stone*, 20 How. 170; *Wallace v. McConnell*, 13 Pet. 136; *The Kalorama*, 10 Wall. 204; *Cook v. Burnley*, 11 Wall. 659; *Stanton v. Embrey*, 93 U. S. 548-554; *Gordon v. Gilfoil*, 99 U. S. 168; *Rio Grande R. R. Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. Rep. 155; *Hughes v. Elsher*, 5 Fed. 263; *Latham v. Chafee*, 7 Fed. 520; *Crescent City etc. Co. v. Butcher's Union etc. Co.*, 12 Fed. 225; *Currie v. Lewiston*, 15 Fed. 377; *Weaver v. Field*, 16 Fed. 22; *Clafin v. Lisso*, 16 Fed. 897; *Chewett v. Moran*, 17 Fed. 820; *Hurst v. Everett*, 21 Fed. 218; *Brooks v. Vermont Cent. R. R. Co.*, 22 Fed. 211; *Washburn etc. Co. v. Scutt*, 22 Fed. 710; *Hauf v. Wilson*, 31 Fed. 384; *Beekman v. Hudson River etc. Ry. Co.*, 35 Fed. 3; *Pierce v. Feagans*, 39 Fed. 587; *Rawltzer v. Wyatt*, 40 Fed. 609; *Converse v. Michigan Dairy Co.*, 45 Fed. 18; *Coe v. Aiken*, 50 Fed. 640; *Gilmour v. Ewing*, 50 Fed. 656; *Briggs v. Stroud*, 58 Fed. 717; *Blydenstein v. New York Security etc. Co.*, 59 Fed. 12; *Rejall v. Greenwood*, 60 Fed. 784; *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.*, 61 Fed. 199; *Shorb v. Hapburn*, 75 Fed. 113; *Compton v. Jesup*, 68 Fed. 263; *Hughes v. Green*, 75 Fed. 691; *Holton v. Guinn*, 76 Fed. 96; *Wonderly v. Lafayette Co.*, 77 Fed. 665; *Zimmerman v. So Relle*, 80 Fed. 417; *Breudel v. Charch*, 82 Fed. 262; *Hughes v. Green*, 84 Fed. 833; *Railroad and Telephone Companies v. Board of Equalizers*, 85 Fed. 302, 318; *Green v. Underwood*, 86 Fed. 427. Similar rulings have been made in many of the state courts when the pendency of proceedings in a national court has been set up as a defense or in abatement of an action. The following cases hold that the pendency of such proceedings is not a bar: *People v. Judge of Wayne Co.*, 27 Mich. 406, 15 Am. Rep. 195; *Mitchell v. Bunch*, 2 Paige, 606, 22 Am. Dec. 669; *International etc. Ry. Co. v. Barton* (Tex. Civ. App.), 57 S. W. 292; *State v. New Orleans*

etc. R. R. Co., 42 La. Ann. 11, 8 South. 84; Nichols v. Marsh, 61 Mich. 509, 28 N. W. 699; Utica Clothes Dryer etc. Co. v. Otis, 37 Hun, 301; Kilpatrick v. Kansas City etc. R. R. Co., 38 Neb. 620, 41 Am. St. Rep. 741, 57 N. W. 664; Caine v. Seattle etc. R. R. Co., 12 Wash. 596, 41 Pac. 904; Checkley v. Providence etc. Co., 60 How. Pr. 510; Clark v. Comford, 45 La. Ann. 502, 12 South. 763; Hampton v. Barrett, 12 La. 159; Loyd v. Reynolds, 29 Ind. 299; McGeorge v. Hancock etc. Co., 11 Phila. 602; McRee v. Brown, 45 Tex. 503; Onedia Co. Bank v. Bonney, 101 N. Y. 173, 4 N. E. 332; Russell v. Alvares, 5 Cal. 48; Seymour v. Bailey, 66 Ill. 288; Sullings v. Goodyear etc. Co., 36 Mich. 313; Villavaso v. Barthet, 39 La. Ann. 247, 1 South. 599; Wood v. Lake, 13 Wis. 84; Wurtz v. Hart, 13 Iowa, 515.

In *International etc. R. R. Co. v. Barton* (Tex. Civ. App.), 57 S. W. 292, it was said: "The principal question presented for decision is the ruling of the court on the plea in abatement. This question has been elaborately and skillfully presented in the briefs submitted by the respective parties, and after due consideration we have reached the conclusion that the plea was properly overruled. It presented in substance, the following facts: Appellee had instituted a former suit in the district court of Texas for Travis county, upon the same cause of action presented in this suit against appellant and the Pullman Palace Car Company, which suit had been removed to the circuit court of the United States. But in response to the plea it was shown by proof that appellee had paid all the costs in the state court and in the federal court in the case described in the plea in abatement, and had filed in each of said courts a motion to dismiss the former cause, and elected to abandon the former and prosecute this suit. This right of election seems to have been recognized and approved by our supreme court. Furthermore, we concur with counsel for appellee that, as the federal courts derive their power and jurisdiction from a different sovereignty from that of the state courts; in that sense they are foreign jurisdictions, in like manner as the courts of different states are foreign to each other, and, therefore, the pendency of a prior suit in a federal court will not abate a suit subsequently brought in a state court between the same parties and for the same cause of action, although the two courts may sit in the same state, and have the same territorial jurisdiction." The court cited many authorities in support of this doctrine: *International etc. R. R. Co. v. Barton* (Tex. Civ. App.), 57 S. W. 292. Other cases decided the same way have put their decision upon the ground that such courts were foreign to each other: *Wood v. Lake*, 13 Wis. 84; *Hampton v. Barrett*, 12 La. 159, *Latham v. Chafee*, 7 Fed. 520; *Wadleigh v. Veazie*, 3 Sum. 165, Fed. Cas. No. 17,031; *Lynch v. Hartford etc. Ins. Co.*, 17 Fed. 627. While other courts maintaining the same

doctrine contend that such courts are not foreign to each other: *Brooks v. Mills County*, 4 Dill. 524, Fed. Cas. No. 1955; *Pierce v. Feagans*, 39 Fed. 587; *Coe v. Alken*, 50 Fed. 640; *Marshall v. Otto*, 59 Fed. 249. Other courts decide that the pendency of a prior suit in a state court is not a bar to a suit in a national court on the same cause of action, without any discussion of the relation of such courts to each other: *Crescent City etc. Co. v. Butchers' Union etc. Co.*, 12 Fed. 225; *Stanton v. Embrey*, 93 U. S. 548; *Latham v. Chafee*, 7 Fed. 520; *Rawitzer v. Wyatt*, 40 Fed. 609; *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.*, 61 Fed. 199.

It has also been held that state and national courts are entirely independent of each other, and that the United States circuit courts cannot be called upon to close their doors to suitors because the questions which they seek to litigate are also involved in another action in the state court: *Currie v. Lewiston*, 15 Fed. 377; *Gordon v. Gilfoil*, 99 U. S. 168; *Sharon v. Hill*, 22 Fed. 28, 10 Saw. 394. And it has also been held that the pendency of the same action in a state court is not a good plea in abatement in a national court, though it has concurrent jurisdiction with the state court: *North Muskegon v. Clark*, 62 Fed. 694. The pendency of a suit in equity in a state court cannot be pleaded in abatement or bar of a similar suit involving the same subject matter, and between the same parties in a national court: *Latham v. Chafee*, 7 Fed. 520. And that the pendency of an equity action in a state court cannot be pleaded as a defense to a common-law action in a national court has been held in some cases: *Andrews v. Smith*, 19 Blatchf. 100, 5 Fed. 833; *Loring v. Marsh*, 2 Cliff. 311, Fed. Cas. No. 8514; *Green v. Underwood*, 86 Fed. 427; *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.*, 61 Fed. 199.

The fact that the names of the parties are reversed in the two courts would seem to make no difference as to the abatement of the action because of the pendency of another: *Wadleigh v. Veazie*, 3 Sum. 165, Fed. Cas. No. 17,031; *Blydenstein v. New York Security etc. Co.*, 50 Fed. 12; *Sharon v. Hill*, 26 Fed. 337; *Union Mut. Life Ins. Co. v. University of Chicago*, 10 Bliss. 191, 6 Fed. 443; *Nichols etc. Co. v. Marsh*, 61 Mich. 509, 28 N. W. 699.

Some consideration is due those cases which hold that the pendency of an action is a defense to another proceeding if one is in the national court and the other is in the state court of the same territorial jurisdiction, and if in both suits the cause of action and the parties are the same or the parties in one are privies to the other. It will be noticed that nearly all of the cases maintaining this doctrine are of early date, and their effect is certainly weakened, if not destroyed, by the later decisions in both state and national courts, which have been heretofore cited. The following cases support the rule under consideration main-

taining that an action pending in one court may be pleaded in abatement of a suit in another: *Smith v. Atlantic Mut. Fire Ins. Co.*, 22 N. H. 21; *Radford v. Folsom*, 14 Fed. 97; *Mallett v. Dexter*, 1 Curt. 178, Fed. Cas. No. 8988; *Memphis v. Dean*, 8 Wall. 64; *Central R. R. Co. v. New Jersey etc. R. R. Co.*, 32 N. J. Eq. 67; *Martin v. Baldwin*, 19 Fed. 340; *Nelson v. Foster*, 5 Biss. 44, Fed. Cas. No. 10,105; *Lawrence v. Remington*, 6 Biss. 44, Fed. Cas. No. 8141; *Ex parte Balch*, 3 McLean, 221, Fed. Cas. No. 790; *Earl v. Raymond*, 4 McLean, 233, Fed. Cas. No. 4243. In *Radford v. Folsom*, 14 Fed. 97, it was held that as the jurisdiction of a United States court cannot properly be considered as foreign in relation to the jurisdiction of a state court within the same territorial limits, an action pending in a state court may be pleaded in abatement of a subsequent action commenced between the same parties in the United States court for the district embraced by such state, for the same subject matter and same relief. In *Martin v. Baldwin*, 19 Fed. 340, it was held that pending a suit in a state court for the partition of land, a court of the United States having concurrent jurisdiction may refuse to entertain a suit between the same parties, or their privies, *pendente lite*, where the interests and issues involved are the same. In *Earl v. Raymond*, 4 McLean, 233, Fed. Cas. No. 4243, it was held that the pendency of a suit in a state court may be pleaded in abatement, to a suit subsequently brought by the same parties, for the same cause, in the circuit court of the United States. In such case, the state courts are considered as exercising a jurisdiction, being first assumed, which must abate the suit in the national court, and no other course can prevent a conflict of jurisdiction. In *Nelson v. Foster*, 5 Biss. 44, Fed. Cas. No. 10,105, it was said: "This court has always adhered to the rule not to entertain jurisdiction of a case when we are informed by plea in abatement that a prior suit in equity or at law for the same subject matter between the same parties is pending in a court of the state." In several late cases the practice has been not to dismiss the action in the national court because of the pendency of proceedings in the state court, but to suspend action in the second suit until the first is tried and determined. Thus in *Zimmerman v. So Relle*, 80 Fed. 417, it was held that suits between the same parties to quiet title to the same lands are of such a nature that when one is pending in a state court and the other in a national court, and the state court first acquires jurisdiction, the national court should stay its hand until the cause in the state court is determined. But it should not dismiss the case when the state court may leave some matters at issue undetermined, which may be properly adjudicated by the national court. And in *Hughes v. Green*, 84 Fed. 833, it was held that while, as between two suits for the same relief in the enforcement of a lien on specific property, or similar

purposes, one in a state, and the other in a national, court, the one in which process is first issued and served must be allowed to proceed without interference from the other, the practice is not to dismiss, but to suspend action in the second suit until the first is tried and determined. In *Green v. Underwood*, 86 Fed. 427-429, it was said that "no rule of practice is better settled than that in an action at law in personam pending in the United States court, the plea of *lis pendens* between the same parties in a suit brought in the state court is no bar to the prosecution of an action in the United States court. This court has, in an equity proceeding, held that where there was pending in a state court, between the same parties, a proceeding in equity involving the same matters, such as the possession of specific real or personal property, or to quiet the title to real estate, in which it might become necessary to appoint a receiver pendente lite, or in which it might become necessary to grant an injunction, or to take some other preservative auxiliary action, the court which first acquires jurisdiction of the parties and of the subject matter ought to be permitted to proceed to final judgment. But even in a court of chancery, where the rules of equity possess such flexibility as to permit the court to proceed *ex aequo et bono*, with large discretion, to preserve the rights of the parties, it will not, upon the plea of *lis pendens*, dismiss the suit in the federal court, but will simply postpone the hearing thereof until the hearing and determination of the suit in the state court." And in *Zimmerman v. So Relle*, 80 Fed. 420, the court said: "Indeed, considering the numerous reasons which may render it advisable and not improper to commence a second suit, although a prior suit is pending in which the plaintiff's rights may be fully adjudicated, we think it is the better practice in all cases to pursue the course last indicated when a plea of *lis pendens* is interposed and sustained. The mere pendency of a second suit, if no action is taken therein, does not affect the orderly prosecution of the first suit, and the court is much better able to determine after the first suit is ended, whether it is necessary or proper to grant further relief in the action which was last brought."

Foreclosure Proceedings.—The cases are agreed that the pendency of a suit in a state court for the foreclosure of a mortgage is not a bar to a suit in a national court between the same parties for the foreclosure of the same mortgage: *Weaver v. Field*, 4 Wood, 152, 16 Fed. 22; *Mercantile Trust Co. v. Lamolille Valley R. R. Co.*, 16 Blatchf. 324, Fed. Cas. No. 9432. Thus the pendency in the state courts of a suit by the trustees of a railroad mortgage to foreclose is not a bar to a similar suit in a national court by a bondholder secured thereby: *Beekman v. Hudson River etc. Ry. Co.*, 35 Fed. 3. If a mortgagee sues to foreclose in a national court, and makes judgment creditors of the mortgagor's grantor,

parties defendant, the suit will not be postponed until the termination of proceedings instituted by these creditors in a state court to establish their liens on the land, to which proceedings the mortgagee is not a party: *Converse v. Michigan Dairy Co.*, 45 Fed. 18. And the pendency in a state court of a suit to settle priorities between lienholders upon property, even though the bill prays the appointment of a receiver, does not defeat the jurisdiction of the United States court in a suit brought for the foreclosure of a trust and sale of the property, especially when the proceeding in the state court has been pending for several years, and its object is practically accomplished: *Stewart v. Chesapeake etc. Co.*, 4 Hughes, 41, 5 Fed. 149. Pendency of a former suit in a state court brought by mortgagors against the trustee in a deed of trust, and others, to restrain such trustees from selling the property under a power of sale, is no defense to a suit to foreclose the mortgage in a national court, especially when the parties are not identical: *Pierce v. Feagans*, 39 Fed. 587. In this case the court said: "Again, the suit in the state court is pending in a different jurisdiction. It is now well settled that the pendency of a suit in a state court cannot be taken advantage of by way of a plea of *lis pendens* to defeat a suit of the same nature, and between the same parties, in the federal courts. The two courts, though not foreign to each other, belong to different jurisdictions in such sense that the doctrine of *lis pendens* is inapplicable": *Pierce v. Feagans*, 39 Fed. 587; and to the same effect is the case of *Wood v. Lake*, 13 Wis. 84, and *Seymour v. Davis*, 66 Ill. 288.

Different Parties.—A suit pending in a state court between parties not the same as in a suit in a national court cannot be pleaded in abatement in the latter court: *Cook v. Bumley*, 11 Wall. 659; *Hay v. Alexandria etc. R. R. Co.*, 4 Hughes, 331, Fed. Cas. No. 6254a; *Brooks v. Mills County*, 4 Dill. 524, Fed. Cas. No. 1955. State and national courts are entirely independent of each other, and the national courts cannot be called upon to close their doors to suitors simply on the ground that the questions which they seek to litigate are also involved in other actions between different parties in the courts of the state: *Currie v. Lewiston*, 15 Fed. 377. The pendency of other proceedings by other parties in a state court is not a defense to an action in the national court where the object of the second suit is not to affect the possession of the other court in respect to the matter in litigation: *Parsons v. Greenville etc. R. R. Co.*, 1 Hughes, 279, Fed. Cas. No. 10,776; *Loyd v. Reynolds*, 20 Ind. 299; *Andrews v. Smith*, 19 Blatchf. 100, 5 Fed. 833; *Washburn v. Scutt*, 22 Fed. 710. Some courts have gone so far as to hold that the reversal of the names of the parties plaintiff and defendant in the two actions makes the parties different: *Certain Logs of Mahogany*, 2 Sum. 589, Fed. Cas. No. 2559; *Barr v. Chapman*, 5 Ohio C. C. 69. In the latter case the

court said: "It seems to be the established doctrine of the law that the pendency of one suit cannot be successfully pleaded in abatement or in bar of a second suit between the same parties unless it appear that the second suit was by the same plaintiff, against the same defendant, and for substantially the same cause of action, which cannot be the case when the parties are reversed": *Barr v. Chapman*, 5 Ohio C. C. 69. In many cases, however, first cited in this note, no attention was paid to the fact that the parties plaintiff and defendant were reversed in the two actions, and the courts seem to have deemed them the same parties when deciding that the pendency of an action in one court was no cause for the abatement of the action in the other.

Attachment and Garnishment.—In an action on a debt in a national court it is no defense that the debtor has been garnished in a state court in a pending action by a creditor of the plaintiff: *McKee v. Brown*, 45 Tex. 503. A suit brought in a national court on a note is not ground for a plea in abatement of a subsequent suit in a state court by attachment against the defendant garnishing money in his hands: *Campbell v. Emerson*, 2 McLean, 30, Fed. Cas. No. 2357. In a suit in a national court by the holder of a note against the maker, it is no defense that a creditor of the original payee has endeavored to attach the same note by bill in equity in the state court making the payee a party by publication, and has afterward filed a supplemental bill in the state court endeavoring to enjoin the attorneys in the national court from collecting it: *Hauf v. Wilson*, 31 Fed. 384. The defendant in a national court in an action of assumpsit cannot plead in abatement that a writ of garnishment was afterward sued out of the state court and is still pending: *Greenwood v. Rector*, Hemp. 708, Fed. Cas. No. 5792; *Freeman on Executions*, 3d ed., 826. In a suit on an insurance policy in a national court a plea that the money has been previously attached or garnished in a state court in an action yet pending is not a good plea in abatement. In such case the two courts are foreign to each other: *Lynch v. Hartford F. Ins. Co.*, 17 Fed. 627. The jurisdiction of a national court having attached in an action on a note cannot be arrested or taken away by any subsequent garnishment in a state court: *Wallace v. McConnell*, 13 Pet. 136; *Certain Logs of Mahogany*, 2 Sum. 589, Fed. Cas. No. 2559.

Creditors' Bills.—The pendency of a general creditor's bill against a defendant in a state court, accompanied by the usual orders of injunction, does not necessarily forbid a creditor who is not a party to the bill from suing the defendant in a national court, especially when the prosecution of the latter suit is merely for obtaining judgment, and is by proceeding not affecting the property of the defendant: *Parsons v. Greenville etc. R. R. Co.*, 1 Hughes, 279, Fed. Cas. No. 10,776. In *Rejall v. Greenhood*, 60 Fed. 784, it appeared that a creditor's bill filed in a national court alleged

that one of the defendants therein had made an assignment, in which the plaintiff was a preferred creditor, and that the other defendants, though having notice of this assignment, had taken possession of the property and had converted a part of it. The defendants filed a plea alleging that they had sued in the state court to have the assignment set aside as fraudulent, and that a receiver had been appointed in such suit. The court held that the pendency of this suit was no bar to the bill in the national court, especially as the plaintiff was not a party in the state court.

A bill in equity in a state court to prevent creditors from obtaining more than their share under a general assignment, by reason of their having securities, is not abated by a suit pending by the same plaintiffs in the district court of the United States, to set aside the assignment as fraudulent and void: *Wurtz v. Hart*, 13 Iowa, 515. In a suit in a national court by a nonresident creditor to set aside a trust deed made by his debtor, it is no defense that prior proceedings are pending in a state court under an assignment for creditors made by the debtor: *Gould v. Mullanphy Planing Mill Co.*, 32 Fed. 181. And the jurisdiction of a national court, previously acquired, cannot be ousted by proceedings in insolvency in state courts, if the parties invoking such jurisdiction have not participated in the insolvency proceedings: *Clafin v. Lisso*, 16 Fed. 897.

Admiralty Cases.—Pendency of a libel in admiralty against a vessel is no bar to an attachment suit at law in a state court against the owners for the same cause of action: *Wolf v. Cook*, 40 Fed. 432. In an action for freight money brought in a state court, it is not a sufficient answer to allege that the vessel has been libeled for the nondelivery of freight in a national court, as both actions may proceed at the same time without danger of a clash of jurisdiction: *Russell v. Alvarez*, 5 Cal. 48. In an action in a state court for services in fitting out a vessel, defendant cannot plead in abatement the pendency of an action in rem for the same matter in a national court: *People v. Judge of Wayne County*, 27 Mich. 406, 15 Am. Rep. 195. A suit in a state court by replevin or attachment against a vessel cannot supersede the right of a court of admiralty to proceed by a suit in rem to enforce a right or lien, against such vessel: *Certain Logs of Mahogany*, 2 Sum. 589, Fed. Cas. No. 2559; *The Kalorama*, 10 Wall. 204; *Caine v. Seattle etc. R. R. Co.*, 12 Wash. 596, 41 Pac. 904.

Probate Matters.—The pendency of a suit in a state court for the construction of a will cannot be pleaded in abatement or bar of a similar suit involving the same will in a national court: *Loring v. Marsh*, 2 Cliff. 311; Fed. Cas. No. 8514. The pendency of administration proceedings in a state probate court does not bar proceedings in national courts involving the same issues: *Holton v. Guinn*, 76 Fed. 96. Pending the settlement of an estate in a

state probate court, a citizen of another state, who is a legatee under the will, may maintain a suit in a national court against the resident executor and other legatees and heirs to recover such legacy: *Brenden v. Charch*, 82 Fed. 262. In a suit in a national court to subject land in the hands of heirs to the payment of their ancestor's debt, it was held that proceedings in a state court to settle the estate, limiting the time within which creditors should present their claims and the discharge of the administrator before the filing of the bill, did not bar the action in the national court, if the complainant did not prove his claim in the state court, and allowed the time limited for the proof of claims to expire. The court also held that the jurisdiction of the national court could not be affected by any provision of the state law requiring creditors to appear before the state court and present their claims: *Chewett v. Moran*, 17 Fed. 820. If a bill is brought in a national court to set aside an alleged fraudulent appointment under a will, and to enforce the rights of a distributee in the estate, a plea in abatement merely alleging the pendency of prior proceedings in the probate court of another state, without distinctly showing that that court has possession of the res, cannot be sustained: *Briggs v. Stroud*, 58 Fed. 717.

Judgments.—The fact that one is suing in a state court upon a judgment of a national court does not prevent him from proceeding at the same time in a national court to revive the judgment by *scire facias*. This results from the rule that the pendency of another suit between the same parties respecting the same subject matter in a state court is no bar to a proceeding in a United States court: *Wonderly v. Lafayette County*, 77 Fed. 665.

GANO v. FARMERS' BANK.

[103 Ky. 508, 45 S. W. 519.]

SURETYSHIP—RELEASE OF SURETY.—If a person becomes surety on a contract to enable his principal to raise money with which to operate a business, the surety is released from liability, if the person furnishing the money has knowledge of the purposes of the contract, and without the knowledge of the surety, and without intentional fraud, applies a portion of the money thus raised to the payment of a pre-existing debt of the principal.

SURETYSHIP AND GUARANTY—NOTICE OF ACCEPTANCE.—If an offer by a person is to guarantee a debt for which another is primarily liable in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor, but the creditor must notify him of his acceptance of the offer, or of his intention to act upon it, and the guarantor is not bound to inquire as to the acceptance of his proposal.

G. E. Prewitt and J. Y. Kelly, for the appellant.

Owens & Finnell and V. F. Bradley, for the appellee.

⁵¹⁰ HAZELRIGG, J. The appellant Gano and nine others executed a writing to the end that one P. T. Pullen might obtain the sum of ten thousand dollars with which to run a milling business in Georgetown, Kentucky.

The appellant bank, on the strength of this writing, furnished five thousand dollars, which was used to pay off a debt then owing the bank by Pullen, and also five thousand dollars which was used in the business. After a time, Pullen being insolvent, the bank called on the obligors in the writing for a discharge of their undertaking. All seemed to have paid their respective shares demanded by the writing except the appellant, who tendered certain issues of law and fact in defense of the action which followed his refusal to pay his share.

The writing which forms the basis of action is as follows: "P. T. Pullen, of Georgetown, Ky., contemplating the leasing of the Thompson Mills and carrying on the milling business, and being in need of capital with which to buy stock and run the same as it should be run successfully, now, in order to aid him, we, W. E. Pullen, George Carley, George V. Payne, T. T. Hedger, J. M. Penn, James W. Craig, Buford Hall, Daniel Gano, S. B. Triplett and Warren C. Graves, whose names are hereto signed, agree ⁵¹¹ to become his surety to an amount not exceeding \$10,000 in the aggregate. After this instrument of writing has been signed by all of us (ten in number), it may be used by the said P. T. Pullen in the nature of a collateral for a sum or sums not exceeding \$10,000 in the aggregate, and we, the said signers, shall be bound jointly and severally as sureties upon any note or notes not exceeding in the aggregate said sum to which said Pullen shall sign his name and deposit this as collateral. In case the money is borrowed of more than one party, the lenders can agree upon who shall hold this writing for the benefit of all. Said Pullen agrees to mortgage all property he now has to us, in order to secure us by virtue of obligations assumed in this instrument, and renew said mortgage from time to time when required upon any and all property he may have. This instrument of writing to continue in force for three years from the first day of July, 1891, and no longer, and if at any time any one or more of the signers hereto should die or become insolvent, said Pullen is to either pay off his or their portion of the money that may be borrowed, or furnish

other good and solvent surety or sureties in his or their stead. Said Pullen agrees to keep all grain and flour he may have on hand insured in some good insurance company for the benefit of the signers hereto, and his books are at all times to be open to the inspection of any one or all of the said signers, either in person or by an expert of their selection. Given under our hands this 15th day of July, 1891. (Signed) Geo. V. Payne," and others named in the writing.

The paper, as we have already indicated, was taken by ⁵¹² Pullen to the appellee, to whom Pullen was then indebted in the sum of five thousand dollars, evidenced by Pullen's note with his brother as surety. A new note was then executed to the bank for five thousand dollars, and this note was then discounted by the bank and the proceeds taken to pay off this pre-existing debt. It is therefore insisted for the appellant that the principle announced in *Russell v. Ballard*, 16 B. Mon. 205, is applicable here, and, when applied, the surety stands discharged. It was there said: "If a note be purchased by a party, with notice that one of the obligors is surety merely, and that the sale and purchase will defeat the purpose for which it was executed by him, or will violate any understanding or agreements between him and his principal, then the purchaser will be affected by such notice and cannot hold the surety liable on the note to compel him to pay it." Here the bank has notice that Gano was surety merely on the writing taken as collateral by the bank to secure the new note. And it had notice that the sale and purchase of this new note and application of its proceeds to pay off the old debt would defeat the sole purpose for which the writing was executed by the surety, namely, "to raise the sum of ten thousand dollars, buy stock and run the same."

This would seem sufficient to bring the case within the principle announced in the cited case. For it is manifest that if one-half the capital needed to carry on the milling business and "run the same successfully" was to be taken to pay off an old debt, the business must suffer and likely not be run successfully. But this is not all. The bank had ⁵¹³ notice that the sureties looked to the property which this money—all of it—would buy as an indemnity by way of mortgage. And by whatever amount the actual cash furnished Pullen for his business was lessened, by that amount the value of their indemnity would be lessened. This is also in line with the general doctrine so often announced by the text-writer and by this court for the protection of sureties. We might assume

without proof—but the evidence is conclusive on the point—that appellant would not have entered into this contract had it been disclosed to him that this “letter of credit,” as the writing may be termed, was to be used to pay off the large debt due the bank, and therefore it was incumbent on the bank to disclose to the surety all the facts material to the risk before it could divert the fund intended to be raised by the collateral to purposes of its own. The rule is thus stated by Mr. Story in his *Equity Jurisprudence*, section 324: “The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts or any express or implied misrepresentation of facts or any undue advantage taken of the surety by his creditor, either by surprise or by withholding proper information, will undoubtedly permit sufficient grounds to invalidate the contract.” And further: “Thus, if a party taking a guaranty from a surety conceals from him facts which increase his risk and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make ⁵¹⁴ the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist”: *Story’s Equity Jurisprudence*, secs. 214, 215. See *Commonwealth v. Berry*, 95 Ky. 443, 26 S. W. 7, and cases cited.

Other obligors who lived in or about Georgetown, the scene of this transaction, seem either to have had knowledge of these material facts at the time or obtained it shortly afterward, and having that knowledge, still paid off their shares; but the appellant was an old man, some eighty-five years of age, living quite a distance from the town and visiting there only a few times within a year. There is no doubt of his entire ignorance of the material facts indicated. He was not even apprised of the fact that the writing had been used by Pullen with the bank or anyone else and money obtained thereby. It seems to be clear that he was entitled to this notice. He had merely offered his name with that of others as surety to whomever might accept the offer and loan of money. He was therefore entitled to notice of acceptance. In *Steadman v. Guthrie*, 4 Met. (Ky.) 148, it was held that “when the offer is to guarantee a debt for which another is primarily liable, in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor; but the creditor must notify the guarantor of his acceptance of the

offer or of his intention to act upon it. That the guarantor might, by inquiry from the person in whose favor the guaranty was given, have learned what had passed between the guarantees and himself, will not dispense with notice. A person thus proposing to become surety for another is not bound to inquire as to the acceptance ⁵¹⁵ of his proposal; the creditor, who intends to hold him responsible for the debt of another must show reasonable notice of such intention": See, also, *Kincheloe v. Holmes*, 7 B. Mon. 5, 45 Am. Dec. 41; *Lowe v. Beckwith*, 14 B. Mon. 189, 58 Am. Dec. 659; *Thompson v. Glover*, 78 Ky. 195, 39 Am. Rep. 220. It is true in this case that the record does not show that the bank's old debt on Pullen was in danger of being lost. It was secured by the brother of the debtor who was solvent, although his property was, in the main, covered by mortgages and he was already indebted to the bank in a considerable sum. Still it may be said he was insolvent. We think this, however, makes no difference. It may show more conclusively—what is already apparent enough—that there was no actual fraud intended by the bank or any of its officers in the transaction, but this does not change the legal status of the parties on the point involved. It further appears that the brother of the principal debtor, who was surety on an old debt, had a mortgage on certain stock and property belonging to the debtor to indemnify him in his suretyship, and this was released and a mortgage taken in favor of the obligors in the writing in question. But it further appears that the value of this property was quite insignificant, and that appellant had no knowledge even that this had been done.

The writing, the contents of which the bank had notice because they accepted and acted on it, entitled the obligors to have a mortgage on all the property the debtor had or might acquire, and we do not see that because one was in fact executed of which no notice whatever was given to the appellant can take the place of the notice to which ⁵¹⁶ we have said appellant was entitled when his offer was accepted and acted on by the bank.

Actual notice is what the law requires, and notice or knowledge of this new mortgage might have been sufficient, but this the appellant did not have.

We think the plaintiff's petition should have been dismissed, and the judgment is reversed for proceedings consistent with this opinion.

GUARANTY—NOTICE OF ACCEPTANCE.—To bind a guarantor, it must appear that he was notified of the acceptance of the guaranty, and of the reliance upon it: *Roberts v. Griswold*, 35 Vt. 496, 84 Am. Dec. 641; *Acme Mfg. Co. v. Reed*, 197 Pa. St. 359, 80 Am. St. Rep. 332, 47 Atl. 205.

SURETY AND GUARANTOR—RELEASE OF.—Noncommunication by a creditor to a surety of material facts, although not willful or intentional, discharges the surety: *Jungk v. Holbrook*, 15 Utah, 198, 62 Am. St. Rep. 921, 49 Pac. 305. A change or alteration in a contract to which a guaranty is applicable discharges the guarantor: *Page v. Krekey*, 137 N. Y. 307, 33 Am. St. Rep. 731, 33 N. E. 311.

HELTON v. ASHER.

[103 Ky. 730, 46 S. W. 22.]

DEEDS—FAILURE TO SIGN—VALIDITY—RECORD OF AS EVIDENCE.—A deed in the usual form, but not signed, though acknowledged by the grantor and recorded, is not valid, and the record of such deed is not admissible in evidence, as the recording thereof is unauthorized.

EVIDENCE—LOST WRITINGS.—Due execution and genuineness of an alleged lost paper must be shown before secondary evidence of its contents is admissible.

EVIDENCE—DECLARATIONS OF DECEDENT.—A party to an action cannot testify in his own favor as to declarations made by his deceased ancestor, from whom he and his opponent derive title to the land in dispute.

EVIDENCE—PARTIES—REPORT OF SURVEYOR.—The rights of persons cannot be affected by the report of a surveyor made in an action to which they were not parties.

N. B. Hayes and Holt & Holt, for the appellant.

W. S. Pryor and C. P. Chenault, for the appellees.

732 PAYNTER, J. In 1845 there was issued to Robert Helton a patent for four hundred and fifty acres of land on Straight creek, Harlan county, Kentucky. The patentee was the ancestor of the appellants. He died in 1883 or 1884. The appellants claim that they inherited the land from their father, and seek to recover damages for alleged trespass upon it. The appellee, Parks B. Howard, claims the land, and the appellee, Asher, claims certain timber on it, under a contract with Howard. It is conceded that Robert Helton acquired title to the land by virtue of his patent from the commonwealth of Kentucky. The appellees seek to show that Robert Helton in his lifetime divested himself of the title to the land by a conveyance of it to one Z. B. Saylor, and that therefore the land

did not descend to the plaintiffs. To establish the fact that Robert Helton had conveyed the land to Saylor, they offered in evidence a record book of deeds of Harlan county, in which was recorded an instrument called a deed from Robert Helton to Saylor. It is in the usual form of a deed, in which Robert Helton is called the party of the first part and Z. B. Saylor party of the second part, and it appears not to have been signed by Helton. There is a certificate recorded with it which purports to be a certificate of one John G. Crump, clerk of the Harlan county court. The certificate recites that "the deed from Robert Helton to Z. B. Saylor was this day produced to me in my office and acknowledged by Robert Helton to be his act and deed." The instrument and the clerk's certificate bear date March 3, 1851. The instrument is concluded in words as follows: "Given under my hand the day and ⁷³³ date above written." But, as we have said, Helton's signature does not follow this language, nor does it appear that his name was signed at any other place. The statute of frauds was then in force. The first section of that statute provided, "that no action shall be brought . . . upon any contract for the sale of lands, tenements, or hereditaments, . . . unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized": 1 Morehead and Brown's Ky. Stats. 734.

The instrument in question was invalid. The certificate of the clerk could not impart any validity to it. It was essential to its validity that it should have been signed by Helton. Had it been signed by him and acknowledged before the clerk, then it would have been a recordable instrument. To enable the clerk to record the instrument, it was just as essential that it should have been signed by him as it was for him to have acknowledged it before the clerk. As the paper was not properly on record, the copy of it offered was inadmissible as evidence. Had it not been invalid and inadmissible as evidence for the reason we have given, then the court should have sustained the appellant's motion to exclude it from the jury, because the calls in it did not embrace the land in controversy. This was proven to be true by the appellee, Howard, and the surveyor who was introduced as a witness by the appellants.

The appellees seem to have felt that the paper did ⁷³⁴ not divest Robert Helton of his title to the land, for they en-

deavored to show that he had executed and delivered to Saylor a title bond for the land. They seek to do this in part by the evidence of B. F. Howard. He testified that six or seven years after the close of the late Civil War, in looking among the papers of his father, he found a patent which the commonwealth had granted to Robert Helton, and also a title bond which purported to be from Robert Helton to Z. B. Saylor for the land in controversy. He said in his examination in chief that he thought the title bond described the same tract of land which was described in the patent; that he did not know whether or not Helton had signed it, nor was he acquainted with his handwriting; that he did not know of his father having any interest in the land; that he threw the title bond among his father's papers and paid no further attention to it. Whilst he expressed the opinion on his examination in chief that the title bond embraced the same land described in the patent, still, on cross-examination, he said he thought the calls in the unsigned deed were the same; yet the uncontradicted testimony in the record shows the calls in the unsigned deed and the patent were so widely different that the calls of the deed did not embrace the land described in the patent. This testimony was not competent: 1. Because he did not prove that Helton had written or signed the title bond. 2. Because he did not prove that the signature to the bond was in the handwriting of Helton. He said he was not familiar with his handwriting. 3. Because it does not make it clear that the land described in the title bond was the land ⁷³⁵ in controversy, and the court should have excluded his testimony from the jury.

1. Due execution and genuineness of an alleged lost paper must be shown before secondary evidence is admissible to prove its contents; 2. That the paper is lost and cannot be found: *Elwell v. Cunningham*, 74 Me. 127; *Kearney v. Mayor of New York*, 92 N. Y. 617.

In *M'Intire v. Funk*, Litt. Sel. Cas. 427, the court was considering the question of proving the contents of the title bond which was claimed to be lost and said: "Before such evidence could be admitted, the execution of the bond should be proved by competent proof."

In view of the fact we have held part of the testimony incompetent upon which the defendants relied to show due execution and genuineness of the alleged lost paper, we forbear to express an opinion as to the sufficiency of the other testi-

mony offered by the appellees to establish that fact. The court can hear what testimony the defendants may offer in relation to that matter, as well as to the loss of the alleged paper, and the court can determine whether the evidence is sufficient to authorize it to submit to the jury, under proper instruction, the questions as to the execution and delivery of the title bond by Helton to Saylor, and as to whether, if such title bond existed, it embraced the land in controversy.

The court permitted the appellee, Parks B. Howard, who claims the land in this suit, to testify as to the conversation which he had with the deceased, Robert Helton. This testimony is clearly inadmissible under subsection ⁷³⁶ 2, section 606, of the Civil Code of Practice. It also admitted as evidence a surveyor's report made in a case to which neither the appellants nor their ancestors were parties. Their rights could not be affected by the report of a surveyor made in an action to which they were not parties.

It follows from the view we have expressed in regard to the unsigned deed that the court erred in instructing the jury with reference thereto.

The judgment is reversed, with directions that the appellants be given a new trial, and for proceedings consistent with this opinion.

DEED—OMISSION OF GRANTOR'S NAME.—Where one signs, seals, and delivers an instrument supposed to be a perfect deed, but his name appears in no part thereof, his interest in the premises is not conveyed: *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486.

DEEDS.—THE ACKNOWLEDGMENT of a deed by a grantor who did not himself sign it is a sufficient recognition and adoption of the signature: *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82, 13 South. 570.

DEEDS.—REGISTRATION of a deed adds nothing to its effectiveness as a conveyance: *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381, 22 N. E. 976. Recording a void deed gives it no validity: *Stone v. French*, 37 Kan. 145, 1 Am. St. Rep. 237, 14 Pac. 530.

EVIDENCE.—SECONDARY EVIDENCE of the contents of a document is not admissible, unless the original is shown to have existed and its absence is accounted for: *Smith v. Wilson*, 17 Md. 460, 79 Am. Dec. 665; *Hunt v. Roylance*, 11 Cush. 117, 59 Am. Dec. 140. See, also, *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 67 Am. St. Rep. 154, 20 South. 903.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE v. COLER.

[166 N. Y. 1, 59 N. E. 716.]

MANDAMUS—ALLOWANCE OF—REVIEW ON APPEAL.
When the court below has power, in the exercise of its discretion, to grant a writ of mandamus, and does grant it, the action of the court in that respect is not reviewable on appeal.

CONSTITUTIONAL LAW—LAW REGULATING RATE OF WAGES.—The New York labor law requiring contractors for public work, employed by a city, to pay their laborers, workmen, and mechanics not less than the prevailing rate of wages in the locality, and requiring contractors to insert in their contracts a provision of such law that the contracts shall be void unless such rate of wages is paid, is unconstitutional: 1. Because in its actual operation it permits and requires the expenditure of the money of the city or that of the local property owner for other than city purposes; 2. Because it invades rights of liberty and property, in that it denies to the city and the contractor the right to agree with their employes upon the measure of their compensation, and compels them in all cases to pay an arbitrary and uniform rate which is expressed in vague language, difficult to define or ascertain and subject to constant change from artificial causes; 3. Because it virtually confiscates all property rights of the contractor under his contract for breach of his engagement to obey the statute, and it attempts to make acts and omissions penal which, in themselves, are innocent and harmless. It, in effect, imposes a penalty upon the exercise by the city or by the contractor of the right to agree with their employes upon the terms and conditions of the employment.

MANDAMUS—DEFENSE—EFFECT OF IMPORTING A PROMISE INTO A CONTRACT BY FORCE OF A VOID STATUTE.—If a person, having a contract to do city work, fully performs it according to stipulations, and receives from the proper authorities a certificate showing that the contract price agreed upon has been earned, it is no defense to a writ of mandamus sued out by him to compel the city to pay the amount due, that he consented in his contract, according to the provisions of a

labor law, that the contract should be void and of no effect in the event of his violation of such law, respecting the amount of wages to be paid, as the obligations and legal effect of a promise or engagement imported into a contract by force of a statute, whereby the contracting parties agree to obey or execute some law, depend entirely upon the validity of the law. Such a promise or agreement cannot survive the statute upon which it is founded, and, if the statute is invalid, the promise or agreement must fall with it.

Mandamus. The relator, Rogers, contracted with the city of New York to grade a public street, according to the specifications in his agreement. The comptroller of the city, Coler, refused to make payment on the ground that the relator violated certain provisions of the labor law, chapter 415 of the Laws of 1897, as amended by chapters 192 and 567 of the Laws of 1899. This statute required that the wages to be paid for a legal day's work to laborers, workmen, or mechanics upon public work should not be less than the prevailing rate for a day's work in the same trade or occupation in the locality wherein such work was done. It also provided that each contract for public work should contain a provision that the same should be void and of no effect unless the person or corporation making or performing the same should comply with the provisions of the act; that no officer, agent, or employé of the state or of a municipal corporation should pay any sum, or authorize its payment from the funds under his charge or control to any person or corporation, for work done upon any contract, which in its form or manner of performance violated the provisions of the act; that any officer, agent, or employé of the state, or of a municipal corporation therein, who had a duty to act in the premises, and who violated or permitted any evasion of the act, should be guilty of malfeasance in office, etc. A right of action was also therein given to secure the cancellation or avoidance of any contract which, by its terms or manner of performance, violated the act, or to prevent any officer, agent, or employé of such municipal corporation from paying or authorizing the payment of any public money for the work done thereon. The statute also required the contractor, in selecting his employés, to give preference to citizens of the state of New York. The contract contained stipulations in compliance with these provisions. In the execution of the contract, however, the contractor paid to the persons employed by him wages fixed, as to amount, by mutual agreement, and it was conceded that he paid all that was demanded of him or that he agreed to pay, but he did not, in all cases, pay "the prevailing rate," as required by the statute.

It was therefore held by the court, at special term, that the contract and the law were violated and that the relator was not entitled to a peremptory writ of mandamus to compel the comptroller to deliver to him a warrant for the amount due. This order was reversed by the appellate division, though by a divided court, and the relator's application was granted, whereupon the defendant appealed.

John Whalen, corporation counsel, Theodore Connoly, and Terence Farley, for the appellant.

L. Laflin Kellogg and Alfred C. Pette, for the respondent.

7 O'BRIEN, J. There is no dispute with respect to the facts upon which this controversy depends. They are all admitted upon the record, and the appeal involves only questions of law. On the fifth day of February, 1900, the relator entered into a written contract with the proper administrative officer of the city of New York whereby he undertook to regulate and grade a street. The law required that the work should be done by contract. It was a local improvement, the expense of which was ultimately to be charged to and paid by the local property owners. The city was the authority or agency to inaugurate the work, but since it was for the benefit in whole or in part of private property, the owners or their property became liable ultimately for the cost. That the relator actually performed the work embraced in the contract is not denied or disputed. The certificate of the officer in charge of the street was, by the terms of the contract, to be the evidence of performance, and that certificate was given and filed with the defendant, as comptroller, showing that the contract price stipulated to be paid had been earned, and the only ground upon which the defendant has based his refusal to pay is that the relator has not kept a certain stipulation in the contract, which has no relation whatever to the actual performance of the work, but to matters entirely extraneous. In other words, the comptroller asserts that, while the relator has actually performed the work and earned the compensation under the contract, he has forfeited the right to demand payment, since he has not observed the terms of the labor law. He contends that it is not enough that the relator has performed the work, according to the specifications of the contract, unless he performed it by the very means and agencies therein stipulated; that the means and agencies prescribed by the contract were

not mere matters of form but matters of substance. The duty enjoined upon the comptroller, the performance of which is commanded by the writ, was ministerial, and if the relator was not entitled to the writ absolutely and as matter of legal right, the court below had power to grant it in the exercise of discretion, and having granted it, the action of the court in that respect is not reviewable here: *People v. Board of Education*, 158 N. Y. 125, 52 N. E. 722; *People v. Van Wyck*, 157 N. Y. 495, 52 N. E. 559. The court below had power to grant the writ, and having the power, it is of no consequence, even if it be true as alleged, that the reasons given for its action are untenable.

It must be admitted that the attitude of the city authorities in this respect presents a curious and anomalous situation which involves some startling results. If they are right in the position taken, it must follow that the city must accept and receive the benefit of the improvements made by contractors to the extent of thousands or millions of dollars, and though conceding that the work is honestly done, precisely according to the specifications of the contract, yet it may refuse to pay if it is able to show that the contractor has not, in the execution of the contract, paid to all the workmen employed by him what is called the prevailing rate of wages. The city may accept the work and the citizens may enjoy the benefit of it and treat the contract price as something forfeited⁹ by the contractors for their benefit. It is obvious that the reasoning and argument that leads to such a result must be at some point inherently faulty. It is not possible that such injustice can be sanctioned by the courts of any state where the principles of the common law are recognized. The fact that certain provisions of the labor law were actually incorporated into the contract signed by the contractor cannot change or add anything to the strength of the position assumed by the city. The relator is not estopped by the agreement when there is no element of estoppel in the case, and the question is with respect to the validity of the statute and not the construction or effect of the contract in that regard. If the law is valid, it governs the contract and the rights of the parties whether actually incorporated into the writing or not, since all contracts are assumed to be made with a view to existing laws on the subject. If it is not valid, the contractor has not made it so by stipulating in writing to obey it and prescribing the penalty for his own disobedience which

is the forfeiture of all rights under the agreement. It is not in the power of the legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates. The argument that the relator is bound by his voluntary assent to the terms of the contract would apply with equal force to the city and estop it from raising the question now before us, since by the certificate of its own officers that the amount claimed is justly due to the relator, according to the terms of the contract, the question of performance is deemed to be settled. The parties stipulated that this certificate should be final and conclusive, and it is not impeached for fraud or invalidity. Courts in such cases are not bound by mere forms, but must look at the substance of things, and so viewing this transaction it would be idle to attempt to deceive ourselves with the idea that the question involved in this appeal arises out of the stipulations of the parties to the contract or is governed by them, rather than the provisions of a statute. The contract is in the form that we ¹⁰ find it, not because the parties so elected to contract, but for the reason that the statute would not permit them to contract in any other way.

Nor is it entirely true that the statute is a mere direction by the sovereign authority to one of its own agencies to contract in certain cases in a particular way. It is all that, no doubt, and very much more, since it affects personal and municipal rights in many directions that are of vastly more importance than the mere form of a contract to perform municipal work. It is true enough that a city is an agency of the state to discharge some of the functions of government, but these terms do not adequately describe its true relations to the state or the people.

A municipal officer directing a local improvement is not the agent of the state. He is the agent of the city and the city alone is responsible for his negligence or misconduct. If the authorities in charge of the streets of a city are agents of the state, the city ought not to be held liable for their acts or omissions. The city of New York exists under charters and laws as old as the state itself, and while the legislature is clothed with extensive powers with respect to the administration of local government, there are some things beyond its power. The legislature cannot authorize or compel a city to give any of its money or property, or to loan its credit for any private purpose, nor to expend any of its money, di-

rectly or indirectly, for any other than city purposes. If the legislature should by statute require a city to enter into contracts which directly or indirectly secure benefits to private individuals, or particular classes of citizens, and not for purely city purposes, the statute would be void as in conflict with the spirit, if not the letter, of the constitution. All expenditures of money must be for city purposes and that alone, except so far as it is authorized to devote funds to the relief of the poor or to charity, which may be said to be a city purpose in the largest sense. A statute which tends to divert the money or property of the city, or that of the local property owners, from strictly city purposes and devotes it ¹² directly or indirectly to private interests, or to the interests of some class of persons as distinguished from the whole body, whether the transaction is made to assume the form of payments of wages or something else, is in conflict with the spirit and policy of these provisions of the constitution: *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50. The legislature does not possess unrestricted power to bind a city hand and foot with respect to all its local business affairs. It cannot fix by statute the price which it must pay for materials or property that it may need, or the compensation that it must pay for labor or other services that it may be obliged to employ, at least when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. If it could do all these things it could virtually dispose of all the revenues of the city for such purposes as it thought best, and local self-government would be nothing but a sham and a delusion. The constitutional restrictions upon cities with respect to the expenditure of money are of no avail if the legislature can by mandatory laws compel the officers or the governing body to frame contracts in the interest or for the benefit of individuals or classes.

The city is a corporation possessing all the powers of corporations generally, and cannot be deprived of its property without its consent or due process of law any more than a private corporation can, and since its revenues must be used for municipal purposes, it is difficult to see how the legislature can make contracts for it which involve the expenditure of these revenues without its consent. Counsel upon both sides of this controversy assert, and it seems to be undisputed, that there are now pending against the city in consequence of

alleged violations of the statute in question, claims aggregating over six million dollars, representing the difference in the amount actually paid by the city to its employés, and accepted by them under contracts voluntarily made, and what is assumed to be the prevailing rate of wages under the statute. If it be ¹² assumed that the statute requires the city to pay this vast sum in addition to what it paid under its contract with these employés, and which the latter freely accepted, it would be very difficult, if not impossible, to show that such payment is for a city purpose, and thus the municipality is compelled by the statute to violate the constitution. This situation would seem to prove that either the statute or the constitution must be disregarded. To the extent of the sum which the city pays under this statute in excess of that which it actually paid for the work under contracts fairly made in the ordinary course of business, the provision of the constitution limiting expenditures of money to city purposes is violated. These limitations upon the payment of money by cities apply as well to the power of the legislature. What the city is by the constitution forbidden to do, it is not competent for the legislature to authorize or command, either directly or indirectly, and the vice of the statute in question is to be found in the fact that it provides or may provide for a gratuity to some one, or perhaps more properly to some class of citizens.

The city exists under its ancient charters as modified or enlarged by modern enactments for the purpose of local self-government. While the rights and powers so conferred upon the city are subject to change or modification by the supreme power of the state, they cannot be wholly destroyed. It is not true that the internal affairs of cities in this state are absolutely subject to the will of the legislature. The constitution recognizes their existence as political and corporate bodies and has imposed various restrictions upon the powers of the legislature to interfere in matters of local government. It is without power to appoint city officers, though it may provide for their election by the local electors, or their appointment by some local authority. It cannot dispose of the property of the municipality, nor disburse its revenues, however acquired, for any purpose not pertaining to local administration or local government.

The recent amendment to the constitution, which confers upon the mayor in the larger cities and the mayor and governing ¹³ body in the others the right to interpose what may be

called a qualified veto upon acts of the state legislature relating to their local affairs, plainly implies that cities possess a certain kind of political autonomy which, however limited, the legislature may not invade or destroy at pleasure: 1 Dillon on Municipal Corporations, sec. 71-74. It may regulate but cannot destroy powers recognized by the constitution as inherent in the cities of the state. The plain purpose and effect of the law in question was to deprive the city and its contractors of the exercise of all judgment and discretion in the matter of wages to be paid to workmen employed upon all public works. Both the city and the contractor are deprived by the statute of all power to deal with that question, and, consequently, of all power to protect most vital interests in that regard by contract or otherwise. The right which is conceded to every private individual and every private corporation in the state to make their own contracts and their own bargains is denied to cities and to contractors for city work; and, moreover, if the latter attempt to assert such right the money earned on the contract is declared to be forfeited to the city without the intervention of any legal process or judicial decree. The exercise of such a power is inconsistent with the principles of civil liberty, the preservation and enforcement of which was the main purpose in view when the constitution was enacted. If the legislature has power to deprive cities and their contractors of the right to agree with their workmen upon rates of compensation, why has it not the same power with respect to all private persons and all private corporations? That question can be answered in the language which this court used when a case with features somewhat similar was under consideration: "Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated ¹⁴ the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions": *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. It was once a political maxim that the government governs best which governs the least. It is possible that we have now outgrown it, but it was an idea that was always present

to the minds of the men who framed the constitution, and it is proper for courts to bear it in mind when expounding that instrument. The power to deprive master and servant of the right to agree upon the rate of wages which the latter was to receive is one of the things which can be regarded as impliedly prohibited by the fundamental law upon consideration of its whole scope and purpose as well as the restrictions and guaranties expressed. If the city is not permitted to enter into fair contracts with its employés for their services, on such terms as private individuals or private corporations may, it is disabled from performing the duties enjoined upon it by law or from obeying the restrictions of the constitution. Even the ordinary employés in the civil service of the city are protected by the constitution from the exercise of absolute power by the legislature. Appointments and promotions in such service must be made with reference to merit and fitness to be ascertained when practicable by competitive examinations. The legislature has no power to enact permissive or mandatory laws in conflict with that principle. These illustrations, and others which might be given, prove that the proposition that cities and their internal affairs are subjected to the absolute will of the legislature, and that it has the power to command the municipality to do this or that as it may think best is very far from correct. There are many express limitations upon its power and others are to be implied from the very nature of the right of local self-government conferred by the fundamental law. The legislature cannot appoint an officer to make the contracts of a city, and what it cannot do through its own appointee it cannot do by direct action. In this case the legislature made the contract ¹⁵ for the city at least so far as it relates to the employment of workmen and their wages. The prevailing rate of wages must be from its very nature a question of fact, governed by conditions and circumstances over which the contractor has no control. The legislature cannot compel him to decide that question at his peril by depriving him of the right to set it at rest by agreement with his employés.

But the statute also invades private rights in various other directions. The local property owners, who are the parties that in the end must bear the expense of the improvement, are entitled to the benefit of the best judgment and discretion of the city officers in making the contract for the work. To the extent that such judgment and discretion is taken away by arbitrary enactments not in their interest, but in favor of

opposing interests, their constitutional rights of liberty and property are invaded. When the expense of the improvement is enlarged beyond actual and reasonable cost, under ordinary business conditions, as it may be under the statute in question, their property is taken without due process of law. The contractor is a private individual engaged in private business. When he enters into a fair and honest contract for some municipal improvement that contract is property entitled to the same protection as any other property. It is not competent for the legislature to deprive him of the benefit of this contract by imposing burdensome conditions with respect to the means of performance, or to regulate the rate of wages which he shall pay to his workmen, or to withhold the contract price when such conditions are not complied with in the judgment of the city. When he is not left free to select his own workmen upon such terms as he and they can fairly agree upon, he is deprived of that liberty of action and right to accumulate property embraced within the guaranties of the constitution, since his right to the free use of all his faculties in the pursuit of an honest vocation is so far abridged. A statute which enables a city that has entered into a contract with him for the performance of some public work to receive and accept ¹⁶ the fruits of his labor and at the same time refuse to pay for it upon the ground that he omitted to pay the prevailing rate of wages to his workmen, though he paid all they asked and all he agreed to pay, would seem to be an arbitrary interference with his liberty and property, and not within the legitimate sphere of legislation. It is not claimed that the statute has any relation to the public health, the public morals, the public safety, or any of the other objects within the scope of the police power, and it is a somewhat remarkable fact that the learned counsel, who has argued in support of this appeal and of this statute, has not attempted to state the purpose for which it was enacted, but leaves that point wholly to conjecture.

It is impossible to see how such legislation could promote the true interests of the city or that of the local taxpayer, and not difficult to see how in its actual operation it would tend to increase the cost of every local improvement. Indeed, it is conceded on all sides that such has been the effect of the law upon the expense of public improvements in the city of New York. The very ground upon which the city refused to pay was that the contractor did not pay enough for the labor performed. If the claims referred to, aggregating over six mil-

lions of dollars, must be paid, then it is plain that this law will cost the city that sum without any additional or corresponding benefit. The funds necessary to pay these claims would involve the expenditure of money for other than city purposes. It was supposed, no doubt, that the law would benefit wage-earners, but it is not clear how it can if we consider that class of citizens as a body. A law that restricts freedom of contract on the part of both the master and servant cannot in the end operate to the benefit of either. The law forbids the contractor from paying a rate of wages other than what is called the prevailing rate although the laborer is willing to accept it. It calls for the payment, practically, on all occasions of the highest market price, and hence must compel the contractor to employ only such workmen as are competent to earn the very highest rate of compensation. It makes no allowance for the various degrees of efficiency and capacity ¹⁷ that must always exist in so large a part of the community. A person less competent than his neighbor from whatever cause cannot be employed because a uniform rate must be paid without taking into account the varying conditions of life and the degrees of capacity. Such a law may indeed benefit for a time the favored few who possess the largest capacity to earn the largest wages, and in this view it may be said that it provides only for the survival of the fittest. But the effect of the law must be that all those who are too young or too old, or for any other reason less competent than their neighbors, must be deprived of all opportunity to secure employment on all public works in their respective callings, and so the tendency of such legislation is to check individual exertion and to suppress industrial freedom. The contractor is not only deprived of the right to make such contracts with his workmen as would be mutually acceptable and beneficial, but he is required in selecting his employes to give preference to citizens of this state. Citizens of other states and resident aliens are thus subjected to harsh discrimination. The citizens of each state are entitled to all privileges and immunities of citizens in the several states under the federal constitution, and persons still unnaturalized are protected by the broad principles of international law. It is not necessary to inquire how far, if at all, the rights of citizens of other states seeking employment here, or those of aliens who have come here to improve their condition and to earn an honest living, are ignored or restricted by this statute. These questions have not been raised or argued, and we will

only remark that it reverses the settled policy of this state from the earliest times. The policy of New York has always been to welcome not only the citizens of our sister states, but emigrants from abroad to equal participation in all the opportunities and advantages of its business and industrial life. If the policy indicated in the statute now under consideration had been formulated and carried into operation half a century earlier, it may be that the growth and progress of the state would not be the subject of so much pride or as gratifying to all the people as it is ¹⁸ now. These conclusions result from principles that have been often stated by this court when paternal legislation of the same character was under consideration: *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 378, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 435, 17 N. E. 343; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736, 51 N. E. 257; *People v. Warden etc.*, 157 N. Y. 116, 68 Am. St. Rep. 763, 51 N. E. 1006. Numerous other cases might be cited from other jurisdictions that tend to support the views expressed. They are referred to and quoted in the briefs of counsel and it is unnecessary to comment upon them generally.

These cases, however, deal with a great variety of statutes in line with the one involved in the case at bar. They constitute a valuable contribution to the law with respect to the scope and limits of legislative power. In all of them statutes differing in no essential principle from that now under consideration were held void as in conflict with constitutional restrictions, express or implied. The prominent feature in the discussions is that the legislation is condemned as an infringement upon the right of employer and employé to enter into contracts in their own way, and in some of them it was said that such legislation was an insulting attempt to put the laborer under legislative tutelage which was not only degrading to his manhood, but subversive of his rights as a citizen. The statutes considered all profess to be for the purpose of securing to the wage-earner his rights, but it was shown that they were really subversive of them. The following are a few of the laws thus considered and condemned, and it will be seen that they were all in line with the enactment in question: An act forbidding employers from withholding wages from employés engaged in weaving for imperfections in the work: *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533, 28

N. E. 1126. An act to secure operators in coal mines and certain manufactories the payment of their wages at regular intervals and in lawful money: *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Fire Creek etc. Co.*, 33 W. Va. 188, 25 Am. St. Rep. 891, 10 S. E. 288. An act relating to the payment of wages to miners employed upon the basis of the quantity of coal mined: *Ramsey v. ¹⁹ People*, 142 Ill. 380, 32 N. E. 364. An act to provide for payment of wages in money and prohibit the system of truck stores and to prevent deductions from wages except for money advanced: *Frorer v. People*, 141 Ill. 171, 31 N. E. 395. An act to provide for weekly payment of wages by corporations: *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 35 N. E. 62. An act declaring it unlawful for persons engaged in mining to pay wages otherwise than in money: *State v. Loomis*, 115 Mo. 307, 22 S. W. 350. A city ordinance enacting that laborers should receive not less than one dollar and fifty cents per day, and that the day should not exceed eight hours: *State v. Norton*, 5 Ohio N. P. 183. The case last cited is not distinguishable from the one at bar. Indeed, it involves the very question, and while it is not a decision of the highest court of the state, it is based upon the authority and the doctrines of the other cases cited and upon reasoning that seems to be unanswerable. The case at bar differs from these cases, cited from the highest courts of other states, only in the circumstance that here the legislature has made use of municipal corporations to accomplish the purposes which were there condemned. But it must be obvious that what the legislature cannot do directly it cannot do indirectly. It cannot make use of its powers over municipal corporations to subvert rights of liberty and property guaranteed by the constitution.

The compulsory authority of the legislature over municipal corporations in regard to matters of general concern and duties which the people of the several localities owe to the state at large is not questioned. Legislative control in matters political and governmental is complete. But while such corporations are made use of in state governments, and in that character subject to state control, they have other objects and purposes peculiarly local, in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens, and it is from the standpoint not of state

interest but of local interest that the necessity of incorporating cities and villages most distinctly appears. With respect to property and contract rights of ²⁰ exclusively local concern, the state has no right to interfere and control by compulsory legislation the action of municipal corporations. The people of the state at large, through their representatives, have no more authority to dictate to a city the form in which its contracts shall be framed or the wages that it shall pay to laborers than they have to dictate to an individual what he shall eat, drink, or wear. A municipal corporation, in matters affecting its property and its private contract rights, enjoys practically the same immunity from legislative interference for the benefit of private corporations or individuals as is accorded to business corporations and private citizens: *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Citizens' etc. Loan Assn. v. Topeka*, 20 Wall. 655; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Board of Education v. Blodgett*, 155 Ill. 441, 46 Am. St. Rep. 348, 40 N. E. 1025.

The case of *Clark v. State*, 142 N. Y. 101, 36 N. E. 817, cited by the learned corporation counsel, is not in conflict with the views herein expressed. All that this case decided was that the state had power to declare by statute the compensation to be paid to its own employes in the absence of any agreement providing for a different rate. But the right to make contracts for the compensation to be paid, whether greater or less than the statutory rate, is expressly recognized and conceded throughout the opinion, and it is obvious that under the constitution that right could not be abrogated, since the power to employ labor is conferred by that instrument upon the superintendent of public works. The power to employ implies the power to agree upon the compensation, and while the statute was applied to cases where no such agreement was made, it could not deprive the superintendent of the power conferred upon him by the constitution: *People v. Angle*, 109 N. Y. 564, 17 N. E. 413. The statute which was under consideration in that case did not attempt to interfere with the right to make contracts.

In the brief time that we have been able to devote to an examination of this case, it would not be practicable to consider ²¹ all the special features of the law and to determine the parts that are good and those that are objectionable. It will be sufficient for all purposes of this case to say that, in so far

as the statute is invoked to shield the city from the obligation to pay the relator the money due to him, it is not a valid defense, for the reason that some of its most material provisions are in conflict with the constitution.

1. Because in its actual operation it permits and requires the expenditure of the money of the city or that of the local property owner for other than city purposes.

2. Because it invades rights of liberty and property, in that it denies to the city and the contractor the right to agree with their employés upon the measure of their compensation, and compels them in all cases to pay an arbitrary and uniform rate which is expressed in vague language, difficult to define or ascertain and subject to constant change from artificial causes.

3. Because it virtually confiscates all property rights of the contractor under his contract for breach of his engagement to obey the statute, and it attempts to make acts and omissions penal which, in themselves, are innocent and harmless. It, in effect, imposes a penalty upon the exercise by the city or by the contractor of the right to agree with their employés upon the terms and conditions of the employment.

We have already seen that it is no answer to the relator's claim to be paid what is justly due to him to say that he has consented in the contract that it should be forfeited to the city in the event of a violation of the labor law. The question does not originate in any agreement voluntarily made, but arises out of the statute, and the validity or invalidity of that enactment is the fundamental question. Neither the city nor the contractor had any interest in these stipulations. They are in the contract only by force of the mandate of the statute, and, unless the legislature had power to frame the contract in that respect, their presence is of no consequence. The city could not maintain any action for damages for violation of these stipulations by the contractor, for the plain reason that it was impossible for it to sustain any damages under the circumstances. ²² Those provisions are a part of the contract in form only, since they lack the one most essential element of every contract, namely, the consent of the parties. The obligations and legal effect of a promise or engagement imported into a contract by force of a statute, as in this case, whereby the contracting parties agree to obey or execute some law, depend entirely upon the validity of the law. Every person is bound to obey the law irrespective of any express agreement on his part to that effect, but he does not incur any liability or penalty for breach

of an agreement to obey a void law. Such a promise or agreement cannot survive the statute upon which it is founded, but must fall with it, since it can have no independent existence arising from the consent of the parties or the meeting of minds. No one would claim that the terms of the contract precluded the relator from the recovery of what is due to him for the work but for the law which is behind it. The effect of this statute was to make the city a trustee or instrument for the enforcement of the law in the interests of the persons for whose benefit it was enacted, and thus the powers and functions of the municipality are employed for purposes foreign to those for which they were created and exist under the constitution.

The order of the appellate division should be affirmed, with costs.

LANDON, J. I concur in the opinion of Judge O'Brien. I think it proper to state some considerations which I suppose to be pertinent:

1. The city has a governmental capacity, and the business capacity incidental to it. Its governmental capacity does not extend to the wages private persons shall pay their servants, and hence it cannot in its business capacity fix such wages.

2. The relator, in taking care of his part of the contract, is exclusively engaged in minding his private business. The city cannot interfere with him except upon his failure to render proper performance of the work or of some connected requirement affecting the public convenience or safety. ²³ Hence he is an independent contractor, and thus free to hire his own workmen as any other person may.

3. In its business contracts with a person, the state or city is on one side of the contract and the person on the other. Each should render to the other the promised equivalent. Here the contractor has rendered to the city all the equivalent that it has capacity to receive. It cannot ask for more in behalf of itself, but it assumes a grievance in behalf of others, of whom it is neither guardian nor trustee. They are free men. It will be timely to hear them when they ask a hearing. The city thus asks for more than the equivalent promised to it. The vice of its position is that it seeks to thrust into a business contract, in addition to its subject matter, control over the contractor's independent relations with other people. It does not hire his servants, and, therefore, cannot fix their wages.

4. The state, like an individual, may contract for the kind and quality of materials to be furnished in a given construction; otherwise it may not get what it wants. It is, I submit, false analogy to assume that it has the like right to dictate to the contractor the wages he shall pay his workmen. They are not parties to the contract; it is not made for their benefit; the state cannot directly give them gratuities, and therefore, cannot indirectly do so through the contractor; much less by extortion masked under the power to contract. Conceding that the state has a benevolent sentiment of concern in the matter of workmen's wages, that sentiment has no relation to the subject matter the contractor has agreed to deliver; and because it has none, the contrary claim of the state has no just basis. The contract calls for a certain kind of work by Rodgers the relator. If he furnished it, it is of no more business concern to the state than to the individual whether he has meantime furnished his workmen with tooth brushes or paid them extra wages.

5. An officer is a part of the personal force by which the state acts, thinks, determines, administers, and makes its constitution and laws operative and effective. He is an arm of ^{the} the state and always on its side. The contractor, laborer, or employé deals at arm's length with the state, and is always on his own side, not necessarily opposed to the state, but with respect to his service owing it no oath-bound duty, but simply the contractual duty to perform as he has agreed to do. The state can fix the salaries it will pay its officers, but no more than the individual can fix the wages it will pay employés; it can fix the wages it will offer—and its policy is to fix them high enough to secure acceptance by the workmen—but without such acceptance the wages cannot be fixed. They must remain a matter of contract; the power to fix the rate, as distinguished from offering it, includes a low rate as well as a high one, and thus becomes despotic in substance, however dormant in exercise.

6. When an independent contractor with the state or city has performed his work on time, complete in every detail according to the contract, free from every lien and encumbrance, then, if the state or city can escape paying him because he has not voted a certain ticket, made contribution to a certain political party, or paid his workmen any more than they agreed to work for, the state can compel him to choose between losing his earnings or his natural liberty to make such honest contracts

with his fellow-men for their services as they are willing to make with him. To deny an independent contractor such liberty and protect others in it is to deny him the equal protection of the laws.

7. To enact that no less than the prevailing rate of wages shall be paid by such contractor is an indirect method of excluding from his employment those who can earn something, but not so much, since he will not hire those who cannot do the work of an able-bodied man.

8. It is admitted that the contractor paid less than the prevailing rate of wages. No doubt that is true if the highest rate among the best workmen is the test. But what is the prevailing rate of wages? Is it the rate that the best workmen or the largest mass of workmen, or the average workmen, can command? Does it depend upon ability? If so, of which ~~is~~ grade? Or upon numbers? If so, is it the majority of all or of a class? And if of a class, of which class, and why? What rights have those who do not come within the dominant class? Does it depend upon supply and demand? Upon fair competition? How can we tell? Must we not conclude that a statute which simply says the prevailing rate of wages is too indefinite in its meaning to be made the test or condition of a penalty or forfeiture? When a penal statute leaves doubtful the kind of act it denounces the accused is entitled to the benefit of the doubt, and though he may not insist upon the doubt the state out of self-respect, should refrain from inflicting the penalty.

Bartlett and Vann, JJ., concur with O'Brien and Landon, JJ.; O'Brien, J., also concurring with Landon, J., for affirmance; and Martin, J., concurs with O'Brien, J.

Parker, C. J., and Haight, J., read dissenting opinions.

PARKER, C. J., DISSENTED. "The reasoning," he said, "by which the decision about to be made is sought to be supported fails to persuade me that it is other than a judicial encroachment upon legislative prerogative; for it is that and nothing less if the statute does not offend against either the federal or the state constitution. If the statute, which seems to be regarded by some as vicious in its tendency, attempted to regulate the question of wages as between citizens of the state so as to affect, even in the slightest degree, the basis on which one citizen should contract with another, then would not only much of the discussion which this statute has invoked be relevant, but the decision about to be

made would be unquestionably sound. The legislature, however, intended nothing of the kind, and the statute not only omits to express any such purpose, but it is so carefully guarded as to leave no room for doubt that the legislature, appreciating the limits of its authority, intended to and did provide with certainty that those who work directly for the state or upon public works within the state, shall receive that which may be termed going wages in the locality in which any particular public work is being carried on, as will at once appear from a reading of the statute, so much of which as is germane to the question under discussion being set out in the statement of facts. In other words, the legislature, which is vested with the power to direct the conduct of the business operations of the state, by this statute has not only declared it to be the policy of the state as a proprietor to pay the prevailing rate of wages, but has enjoined upon its several agents and agencies the duty of executing this policy. An attack upon this statute, therefore, assails the right of the state, as a proprietor, to pay such wages as it chooses to those who either work for it directly, or upon any work of construction in which it may be engaged."

The learned chief justice then quoted from *Clark v. State*, 142 N. Y. 101, 36 N. E. 817, to show that there is no express or implied restriction to be found in the constitution upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public works of the state; and that a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract, is within the power of the legislature to enact, whatever may be said as to its wisdom or policy; and said: "Now, certainly, it need not be argued that, if the constitution contains no restriction 'upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed on the public works of the state,' there is nothing in the constitution to restrict the power of the legislature in declaring that 'the rate of compensation to be paid for labor or service performed on the public works of the state' 'shall [in the language of the statute] not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about, or in connection with which labor is performed, in its final or completed form is to be situated, erected, or used.' So, if authority be needed, we have the authority of this court that the legislature has the power to provide that the policy of the state shall be to pay the going rate of wages in the locality in which a public work is to be done and to command its agents to obey its directions in that regard."

"But it is said," he remarked, "that this statute goes further and applies not only to the work undertaken by the state at large, but also to the public works carried on in the several municipalities of the state," the particular case before the court growing out of a contract to grade a public street in the city of New York. In answer to this, the chief justice cited *Ingersoll v. Nassau etc. R. R. Co.*, 157 N. Y. 453, 52 N. E. 545, *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. Rep. 617, and *Mayor v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618, to show that the state acting through its legislature has absolute power and control over all the public works within the state, undertaken and carried on with public funds, whether the work be paid for by a municipality or by the state at large; and that those who let the contracts, superintend the construction, audit the bills and pay them, are in such work but the agents of the state, whether the agency be created by the provisions of a charter or by special enactment. "Other authorities," said he, "in which the proposition is, in effect, either decided or asserted that a municipal corporation is simply an agency of the state for the conduct of the affairs of government, and, therefore, subject to the control of the legislature in all respects except as expressly limited by the constitution, are *In re Protestant etc. School*, 46 N. Y. 178; *Terrett v. Taylor*, 9 Cranch, 43; *Payne v. Treadwell*, 16 Cal. 221; *Jones v. Lake View*, 151 Ill. 663, 38 N. E. 638; *Mayor v. Groshon*, 30 Md. 436, 96 Am. Dec. 591; *Groff v. Mayor*, 44 Md. 67; *State Bank v. Madison*, 8 Ind. 43; *Pater-son v. Society etc.*, 24 N. J. L. 385; *State v. Board of Finance*, 38 N. J. L. 259; *In re Dalton*, 61 Kan. 257, 59 Pac. 336."

The chief justice then went on to say that, as the state had determined, by the statute under consideration, to pay the market price for construction work, it directed its agents and agencies, wherever throughout the state they might be situated, that in the doing of a public work they should pay the going wages whenever the work was to be done by day's work, and whenever it was to be done by contract, then the agent, wherever situated, should put into the contract that he executed by authority of the state a provision that the contractor should pay such rate. "But the prevailing opinions," he said, "discuss a question which is not up for decision, namely, whether the legislature has the power to provide that the municipal authorities shall pay to their employes going wages. As the discussion which that question has received is, in my opinion, obiter, I shall not refer to it further than to say that I dissent from the views expressed in relation thereto, on the ground that the statute offends no provision of the constitution when it undertakes to provide that the city shall pay the prevailing rate of wages to those who work for it."

Conceding, however, that the statute was unconstitutional, the chief justice could not see how that could avail the relator.

Whether it was unconstitutional or not, "there was nothing," he said, "to prevent this relator from consenting to the incorporation of the phraseology of the statute into the contract, and, when he did that and voluntarily executed the contract, as in this case, he cannot effectively plead as an excuse for the violation of his contract that, inasmuch as certain of its provisions are void when embodied in a statute, they are also void when incorporated into a voluntarily executed contract."

The majority of the appellate division, while agreeing that the statute was constitutional in so far as it provided for payment of the prevailing rate of wages, and also that the relator, having voluntarily executed the contract, was entitled to payment for work done only upon condition of his performing its stipulations, were still of the opinion that the relator was entitled to a mandamus because the officers of the municipal corporation had failed to avoid the contract prior to the institution of the proceeding; but the chief justice reached a different result, because he thought that the comptroller did all that the situation required to enable the city to take advantage of the relator's breach of the contract. "It must not be forgotten," he said, "that this relator comes into court admitting that he has violated the contract by failing to pay the prevailing rate of wages as he agreed to do, and by his contract he agreed that the effect of his failure to do so should cause the contract to become void and of no effect. This proceeding was instituted against the comptroller because he refused to deliver to the relator a warrant for the amount of the certified account. The reason for it is set up in his return, and is to the effect that the relator had executed a contract by which he had agreed that in the event of his failure to perform certain of its terms and conditions, the contract should be void; that he had failed to comply with such terms; and that hence the contract is void and the city not liable. Now, if there is anything else that the comptroller was bound to do under the circumstances in order to get rid of paying the amount claimed to be due under a contract that had become void, it has not been pointed out. He resisted payment both before and after the commencement of legal proceedings, on the ground that the contract had become void because of the conduct of the contractor, and that is all he was obliged to in order to relieve the city from making further payments under a void contract." The chief justice therefore advised a reversal of the order of the appellate division and an affirmance of that of the special term.

HAIGHT, J., ALSO DISSENTED. "If the labor law, so called, is properly construed," he said, "in the prevailing opinion, it may be that the conclusion reached is justifiable. If the wages provided for by the statute to be paid laborers has reference only to those who are in the prime of life, and in the full possession of

their physical powers, then its effect may be to exclude from employment and the means of earning a livelihood laborers who have passed the prime of life, and have suffered a partial impairment of their physical powers, and thus create a class distinction which is not only objectionable but vicious. I, however, do not think that the statute should receive such a construction. It first fixes the number of hours that shall be deemed a legal day's work, and then provides that: "The wages to be paid for a legal day's work, as hereinbefore defined, to all classes of such laborers, workmen, or mechanics upon all such public works, or upon any material to be used, or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about, or in connection with which such labor is performed in its final or completed form, is to be situated, erected, or used." It will be observed that the statute expressly relates to 'all classes' of laborers. This includes the old and the young, as well as the middle aged and those in the full possession of their powers. But it is claimed that they all must be paid the same wages per day, and that this will operate to exclude from employment all those who have passed their prime and who are unable to perform as much labor as those who are strong and vigorous; but such does not appear to me to be the meaning of the statute. It does not provide that each laborer shall be paid the same wages. It is that they shall be paid the 'prevailing rate.' What is the 'prevailing rate'? The Century Dictionary defines the word 'prevailing' as 'prevalent; current; general; common.' It is the prevailing, current, general, or common rate. In other words, it is the market rate or that which the services are fairly and reasonably worth. Each laborer must, therefore, be paid what his services are worth in the market in that locality. If he is in the prime of life, in the full vigor of his manhood and able to perform a large day's work he is entitled to receive the full value thereof. If he has passed his prime and vigor, and consequently cannot earn so much, he is still entitled to receive the value of such services as he is able to perform. If the prevailing or the market rate means the reasonable value, it, in the absence of a contract expressly fixing the rate, is just the amount which a court of law would award as damages in an action to recover pay for services rendered, and to this extent the provision is but the re-enactment of a part of the common law. Under this construction of the statute there is nothing in its provisions that is objectionable or harmful. It merely gives to the laborer that which he earns and nothing more. It is only what justice and good morals demand. It renders to the servant that which is properly his, and does not deprive the state or any of its municipal governments of any money or property belonging to it. It may be that the statute was intended to

prohibit the making of contracts fixing the rate of wages at a less sum than that which the labor was fairly and reasonably worth, but I know of no provision of the constitution, either federal or state, which prohibits the legislature, in sustaining a just public policy, from enacting that the state or the municipal governments thereof, or persons contracting therewith for the performance of public work, shall not, through contract or otherwise, take advantage of the necessities of the poor and laboring classes and compel them to take employment for wages less than their services are fairly and reasonably worth in the locality.

“The statute under consideration contains a clause requiring persons making contracts for the doing of public work to insert in the contract a provision requiring the payment of laborers at the prevailing rate. Possibly, the legislature cannot accomplish through indirection that which it is prohibited from doing directly; but if I am correct in my view, the legislature may, as part of its public policy, by a direct provision, require the payment in full of the value of the services rendered to the state or a division thereof, or upon any of the public works therein. This view of the statute is an answer to the contention that it authorizes the appropriation of the money or property of a city government to other than city purposes. The laborer who performs work for a city government or upon a contract upon public works of the city is entitled to receive the value of his services rendered, and so long as the city is not required to pay him a greater sum the payment is for a city purpose, and such payment is not an appropriation for any other purpose. I favor a reversal of the order of the appellate division.”

MANDAMUS MAY ISSUE TO COMPEL A CORPORATION, whether municipal or private, to perform a duty imposed by statute: *San Antonio St. Ry. Co. v. State*, 90 Tex. 520, 59 Am. St. Rep. 834, 39 S. W. 926. Compare the note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 92.

CONSTITUTIONAL LAW—RIGHT TO REGULATE LABOR AND POWER TO CONTRACT.—The natural right to labor and enjoy its fruits is subject to reasonable legislative regulation, but cannot be unreasonably interfered with: *State v. Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 785, 51 N. E. 136. The right to make contracts is both a liberty and a property right: *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 35 N. E. 62; it is inherent and inalienable, and any attempt to unreasonably abridge it is opposed to the constitution: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 462.

IN PEOPLE v. COLER, 166 N. Y. 144, 59 N. E. 776, the court below awarded a peremptory writ of mandamus against the comptroller of the city of New York commanding him to deliver to the relator a warrant for the payment of three thousand two hundred and one dollars and sixty-three cents, the amount earned under a contract for constructing a sewer. That case also in-

volved a construction of the labor law, that is, the Laws of 1895, chapter 413, which became section 14 of the labor law, Laws of 1897, chapter 415. That statute provided that: "All stone of any description, except paving blocks and crushed stone, used in state or municipal works within this state, or which is to be worked, dressed, or carved for such use, shall be so worked, dressed, or carved within the boundaries of the state. A clause shall be inserted in all specifications or contracts hereafter awarded by state, county, or municipal authorities, authorizing or requiring the use of worked, dressed, or carved stone therein, except paving blocks and crushed stone, to the effect that all such stone shall be worked, dressed, or carved for such use as required by this act. If any contractor within this state, or within a municipal corporation of the state, shall violate any provision of this act, the state or such municipal corporation shall revoke said contract, and shall be discharged from any liability to any such contractor by reason of said contract."

In pursuance of this enactment the contract between the relator and the city contained the following provision: "All stone of any description, except paving blocks and crushed stone, used in state or municipal work within this state, or which is to be worked, dressed, or carved for said work, shall be so worked, dressed or carved within the boundaries of the state." It was admitted in the record that the relator actually performed the work specified in the contract, according to its terms and specifications, and that the sum claimed by him for payment of which the comptroller was directed by the mandamus to draw his warrant had been earned and was due. The only obstacle to payment found to be in the relator's way was the fact that he had purchased a granite sewer basin in the state of New Jersey, cut, carved, and dressed there instead of in the state of New York. It was urged that this fact furnished a complete defense to the city against the relator's claim for payment, although the work had been accepted and the city and the property owners on the street were enjoying the benefit of it. The court of appeals, however, relying upon the principal case and *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, held, without much discussion, that the enactment requiring all stone for use in municipal work to be cut, carved, or dressed within the state of New York was violative of the constitution of that state for the same reasons stated in the principal case, *supra*.

People v. Coler, 166 N. Y. 144, 59 N. E. 776, however, presented a new and additional question, which was not involved in the principal case. "It will be seen by the provisions of the statute," said O'Brien, J., rendering the opinion of the court, "that the city and the contractor are virtually prohibited from procuring such dressed or carved stone as may be needed in the construction of

the work or the performance of the contract in any other state. The citizen of another state who has prepared dressed or carved stone for the market is virtually prohibited from selling the same in this state to a municipality or contractor for use in any public work. The stone used in such work must be dressed or carved within the jurisdiction of this state, and if the contractor ignores the statute and procures dressed or carved stone in another state the city is directed to revoke his contract, and thereupon it shall be discharged from all liability to pay him for the work.

"We think that this statute is void, not only for the reasons stated in our decision in the case cited, but for the further reason that it is in conflict with the commerce clause of the federal constitution. It is a regulation of commerce between the states which the legislature had no power to make. The citizens of other states have the right to resort to the markets of this state for the sale of their products, whether it be cut stone or any other article which is the subject of commerce. The citizens of this state have the right to enter the markets of every other state to sell their products, or to buy whatever they need, and all interference with the freedom of interstate commerce by state legislation is void. Under the constitution of the United States, business or commercial transactions cannot be hampered or circumscribed by state boundary lines, and that is the effect of the statute in question. We do not think it necessary to enter into any argument to establish these propositions, since the ground has been covered by the discussion in two recent cases in this court: *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736, 51 N. E. 257; *People v. Buffalo Fish Co.*, 164 N. Y. 93, 79 Am. St. Rep. 622, 58 N. E. 34.

"The decisions in the supreme court of the United States, referred to in these cases, are conclusive upon the question. The provision of the contract whereby the contractor agreed to do what the statute required is only a part of the legislative scheme to compel municipalities and contractors to use only such stone as was cut, carved, or dressed within this state in the construction of public works, and, consequently, is subject to the same objection as the statute itself. The contractor's agreement rests upon the statute and must fall with it. The plain purpose and effect of this provision of the contract is to restrict intercourse between the states and compel the city or the contractor to bring stone in the rough here to be dressed, cut, or carved by workmen here. The statute and the contract made pursuant to its command were intended to accomplish the same purpose, and both must fall together": Citing *Addyston etc. Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. Rep. 96. The order of the lower court was affirmed.

But Parker, C. J., dissented. He could not concur, because: "1. The relator bound himself by an agreement, voluntarily entered into with the city of New York, to have the stone used on its

work cut and dressed within the state of New York. He is not relieved from the performance of his agreement in that respect because the city insisted that unless he so agreed he could not obtain the contract, when it need not have so insisted, because there was no valid statute requiring it. . . . Whether the statute was void or not," he said, "the municipal authorities had the power to insist, as they did, upon the conditions in controversy, and the contractor had the right to reject or accept the contract on those terms. He chose to accept, and he should now be held to this agreement as the other party to it demands."

For reasons presented by the dissenting opinions in the principal case, *supra*, the learned chief justice was of the opinion that section 14 of the labor law did not violate the state constitution, and that, as it related only to the business affairs of the state, it was not in contravention of the federal constitution.

GRIFFEN v. MANICE.

[166 N. Y. 188, 59 N. E. 925.]

NEGLIGENCE—MAXIM, RES IPSA LOQUITUR—APPLICATION OF.—It is not the injury, but the manner and circumstances of the injury, that justify the application of the maxim, *Res ipsa loquitur*, and the inference of negligence. Nor does the application of the principle depend on the relation between the parties, except indirectly so far as that relation defines the measure of duty imposed on the defendant.

NEGLIGENCE—CASE OF RES IPSA LOQUITUR—DEFINITION—CASE OF CIRCUMSTANTIAL EVIDENCE.—When the circumstances of an injury, from which a jury is asked to infer negligence, are those immediately attendant on the occurrence, we speak of it as a case of "*res ipsa loquitur*," which, literally translated, means that "the thing speaks for itself"; but when they are not immediately connected with the occurrence, it is an ordinary case of circumstantial evidence.

ELEVATORS—INFERENCE OF NEGLIGENCE FROM ACCIDENT.—If an elevator descends from the eighth floor of a building to the basement thereof with unusual rapidity, and, instead of stopping at the basement, passes beyond until it strikes the bumpers at the bottom of the shaft with such force as to rebound about eighteen inches, and the counterbalance weights immediately fall down the shaft, break through the top of the car, and strike and kill one of its passengers, the jury have a right, under the doctrine of *res ipsa loquitur*, to infer negligence from the accident alone.

ELEVATORS—MAINTENANCE AND OPERATION OF—DEGREE OF CARE REQUIRED.—The owner of a building, who maintains and operates an elevator therein to carry passengers, is bound only to exercise reasonable care. Hence, he is not bound to use the utmost care as to every defect which would be liable

to occasion great danger or loss of life, nor is he "subject to the same rule that applies to a railroad company in regard to its roadbed, engine, and other similar machinery."

ELEVATORS — NEGLIGENCE — OWNER IS NOT EXEMPTED FROM LIABILITY FOR, BY TERMS OF LEASE.— Though a lease declares that the lessor "shall not be responsible for any loss or injury arising from or during the use of the elevator, or the carelessness or negligence of any person," such provision does not exempt him from liability for the death of an employé of the lessee.

David B. Hill and John E. Parsons, for the appellant.

Robert M. Boyd, Jr., for the respondent.

¹⁹¹ CULLEN, J. This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the defendant's negligence. On December 6, 1898, the defendant was the owner and in possession of an office building in the city of New York in which there was maintained and operated an elevator for carrying passengers to and from the several floors. The deceased was the secretary of the United States Fire Insurance Company, which had leased offices in the basement and also in the seventh and eighth stories. On the day in question, after having attended a meeting of the directors of the company, held on the eighth story, he took the elevator to return to the basement. The evidence tends to show that the elevator car descended with ¹⁹² unusual rapidity, and, instead of stopping at the basement, which was the lowest floor, passed beyond until it struck the bumpers at the bottom of the shaft with such force as to rebound about eighteen inches and throw some of the occupants of the elevator down. Almost immediately thereafter the counterbalance weights, which move in a reverse direction to that of the car and consist of pieces of iron, each from forty to sixty pounds in weight, fell down the shaft, breaking through the top of the elevator car. One of them struck the plaintiff's intestate on the head, killing him instantly. The plaintiff recovered a verdict at the trial term, and the judgment entered thereon was unanimously affirmed by the appellate division. By leave of the appellate division an appeal has been taken to this court.

As the decision below was unanimous, the exception to the denial of the defendant's motion to dismiss the complaint at the close of the evidence and the question of the sufficiency of the evidence to support the verdict cannot be argued in this court (Const., art. 6, sec. 9), and our review of the case must

be confined to the correctness of the trial court in its rulings on the admission of evidence and its charge to the jury. We shall limit our discussion to the consideration of the three most important objections urged by the appellant against the recovery.

The trial court, over the appellant's exception, charged to the jury: "There is another rule which the plaintiff asks me to call your attention, and I am going to call to your attention the rule that where an accident happens which, in the ordinary course of business, would not happen if the required degree of care was observed, the presumption is that such care was wanting, and if you find in this case that this accident was one which, in the ordinary course of business, would not have happened if the required degree of care was observed, you have a right to presume that such care was wanting." It is insisted for the appellant that this instruction was erroneous, and that the jury was not authorized in this case to infer the existence of negligence from the accident alone. Primarily, it is ~~189~~ argued that the principle which usually passes under the name of "*res ipsa loquitur*," applies only to cases where the relation between the parties is the contractual one of carrier or bailee, or in which the party injured has been injured while on a public highway. While there are some expressions to be found in text-books and decisions which seem to support this claim, in my judgment it is unfounded, and the application of the principle depends on the circumstances and character of the occurrence, and not on the relation between the parties, except indirectly so far as that relation defines the measure of duty imposed on the defendant. Writing of "*res ipsa loquitur*," it is said in Shearman and Redfield on Negligence, section 59: "It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer." I think a single illustration will show the correctness of the view of the learned authors, that it is not the injury, but the manner and circumstances of the injury, that justify the application of the maxim and the inference of negligence. If a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of

negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train or in consequence of the car being derailed, the presumption of negligence arises. The "res," therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence. The maxim is also in part based on the consideration that where ¹⁹⁴ the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present. Neither of these rules—that a fact may be proved by circumstantial evidence as well as by direct, and that where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation—is confined to any particular class of cases, but they are general rules of evidence applicable wherever issues of fact are to be determined either in civil or criminal actions. In a prosecution for selling liquor without license, it is sufficient for the people to show the sale, leaving the defendant to show his license if he has one: *Potter v. Deyo*, 19 Wend. 361. Recent possession of stolen goods warrants the inference that the possessor is the thief, both because experience shows that usually the party so in possession is the thief, and because the knowledge of how he came into possession of the goods is generally exclusively his own. In *Breen v. New York Cent. etc. R. R. Co.*, 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60, it is said: "There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part." I can see no reason why the rule thus declared is not applicable to all cases or why the probative force of the evidence depends on the relation of the parties. Of course, the relation of the parties may determine the fact to be proved, whether it be the want of the highest care or only want of ordinary care, and, doubtless, circumstantial evidence, like direct evidence, may be insufficient as a matter of law to establish the want of ordinary care, though sufficient to prove absence

of the highest degree of diligence. But the question in every case is the same whether the circumstances surrounding the occurrence are such as to justify the jury in inferring the fact ¹⁹⁵ in issue. In *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530, it was held that the falling of an adjacent building into the street, whereby the plaintiff traveling on the street was injured, was *prima facie* evidence of negligence. In *Piehl v. Albany Ry. Co.*, 30 App. Div. 166, 51 N. Y. Supp. 755, affirmed, 162 N. Y. 617, 57 N. E. 1122, a fly-wheel was disrupted and a portion of it cast across the street into a saloon, killing the plaintiff's intestate. It was held that the mere bursting of the fly-wheel was not sufficient to warrant an inference of negligence. These two cases proceeded on the differing views that this court took as to the nature of the respective accidents, not on the situation of the parties. I think it may be safely said that we would not have held the defendant liable in the latter case had Piehl been killed in the street, or in the earlier case, the defendant exempt, had the plaintiff been injured while in a neighboring building. To put it tersely, the court thought that in the absence of tempest or external violence a building does not ordinarily fall without negligence; while it also thought that the disruption of a fly-wheel proceeds so often from causes which science has been unable to discover or against which art cannot guard, that negligence cannot be inferred from the occurrence alone. Authority is not wanting on the point. In *Green v. Banta*, 16 Jones & S. 156, 48 N. Y. Super. Ct. 156, a workman was injured by the breaking down of a scaffold. In a suit against his master, the court charged: "The fact that the scaffold gave way is some evidence—it is what might be called *prima facie* evidence—of negligence on the part of the person or persons who were bound to provide a safe and proper scaffold." This charge was held correct by the general term of the superior court of the city of New York and the decision affirmed by this court: *Green v. Banta*, 97 N. Y. 627. In *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565, the fall of a wall was held presumptive evidence of negligence in a suit by a servant against his master. In *Smith v. Boston Gas Light Co.*, 129 Mass. 318, it was held that the escape of gas from the pipes of a gas company was *prima facie* evidence of negligence. In that case there seems to have been no contractual relations whatever between the parties. ¹⁹⁶ In *Peck v. New York Cent. R. R. Co.*, 165 N. Y. 347, 59 N. E. 206, which was an action for injury to plaintiff's property by fire, it was said: "But while it was necessary for the plaintiff to

affirmatively establish negligence on the part of the defendant, either in the condition or in the operation of its engine, for which the mere occurrence of the fire was not sufficient, it was not necessary that he should prove either the specific defect in the engine or the particular act of misconduct in its management or operation constituting the negligence causing the injury complained of. It was sufficient if he proved facts and circumstances from which the jury might fairly infer that the engine was either defective in its condition or negligently operated." This is the principle which underlies the maxim of "*res ipsa loquitur*." When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of "*res ipsa loquitur*"; when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence. In *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, it is said: "In no instance can the bare fact that an injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. . . . This phrase, '*res ipsa loquitur*,' which literally translated means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident."

Returning now to the case before us, it appears that the deceased was present by the implied invitation of the defendant, extended to him and all others who might have lawful business on the premises, to use the elevator as a means of proceeding from one story to another. The defendant, therefore, owed the plaintiff the duty of using at least reasonable ¹²⁷ care in seeing that the premises were safe. The death of the plaintiff's intestate was caused by the fall of the counterbalance weights. These weights were held in a frame, to which was attached a rope or cable passing around a drum. The weights fell down from the frame and the rope was thrown off the drum. That no such accident could ordinarily have occurred had the elevator machinery been in proper condition and properly operated seems to me very plain. The court was, therefore, justified in permitting the jury to infer negligence

from the accident, construing, as I do, the term "accident" to include not only the injury but the attendant circumstances.

The next exception of the appellant relates to the degree of care which the learned trial court instructed the jury the defendant was bound to exercise. The court charged: "As to the machinery and appliances by which an elevator is moved and controlled in its ascent and descent an owner is bound to use the utmost care as to any defect which would be liable to occasion great danger or loss of life, and he is in that respect subject to the same rule that applies to a railroad company in regard to its roadbed, engine and other similar machinery. Now, the rule that is applicable to a railroad company as to its roadbed, engine, and machinery is that they are bound to exercise the utmost care and diligence and are liable for the slightest neglect against which human prudence and foresight might have guarded." This instruction is sustained by the decision of the supreme court of California in *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 22 Pac. 266. In *McGrell v. Buffalo Office Building Co.*, 153 N. Y. 265, 47 N. E. 305, the question was discussed by counsel, but not passed upon by the court in its disposition of the case. In determining the correctness of the rule of liability laid down by the trial court, the relation of the parties, which I think not controlling on the application of the maxim "*res ipsa loquitur*," is of vital importance. Doubtless no distinction can be drawn between vertical transportation and horizontal transportation, or transportation along the surface of the earth. If the relationship between the parties and the character of the carrier are ^{the} the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in the other. But the defendant was not a common carrier, and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant, as owner of the property, is deemed to have extended to all who might have business on the premises. To such persons the law imposed upon the occupant or owner the duty of seeing that the premises were in a reasonably safe condition for access and entering (2 *Shearman and Redfield on Negligence*, sec. 704; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175); but "the measure of his duty was reasonable prudence and care": *Larkin v. O'Neill*, 119 N. Y. 221, 23 N. E. 563; *Hart v. Grennell*, 122 N. Y. 371, 25 N. E. 354. If the charge of the trial court is to

be sustained, we must hold that the maintenance and operation of an elevator form an exception to the general standard of care imposed by the law upon the owners and occupants of real property. We see no reason for making this exception. The operation of an elevator, no doubt, involves danger, and if accident occurs it may result in most serious consequences. It is not, however, the only dangerous appliance used in modern buildings. The boiler which furnishes steam heat, the conductors through which electric light is furnished, may at times be the cause of serious accidents. An open hatchway is equally dangerous; yet it has never been attempted to impose upon the owner of a building any greater responsibility as to these matters than that of exercising reasonable care. It is very probable that, in the advance of mechanical arts, many new appliances will be introduced into buildings, which will involve danger. It seems to me impracticable to distinguish as to the measure of the owner's duty between these appliances, and that such an attempt would involve great confusion in the law. I do not wish to be misunderstood. In the exercise of the same degree of care, different degrees of precaution may be necessary. The same man with equal prudence will leave an article of furniture unguarded in his ¹⁰⁰ house and carefully secrete or lock up jewelry or money. So, the more dangerous an appliance may be, the more attention may be requisite. If the fair purport of the charge of the court was only that the care should be commensurate with the danger, it might not be objectionable. The charge, however, goes far beyond this. The utmost human care and foresight would require the owner of a building to use the most modern and improved form of elevator, the latest successful mechanical device and the most skillful operators. Such is the rule in the operation of railroads, and this degree of diligence may well be required where, for a consideration, there is a contract to carry safely. But common knowledge informs us that such a rule would be unreasonable applied to elevators in ordinary buildings. There are elevators not only in great office buildings and hotels, but also in small buildings, and even in many private houses. Where there is little traffic the duty of operating the elevator is at times imposed on an employé or servant with other work to perform. To require in all these cases (and I do not see how it is possible to distinguish between them on the law) the same measure of duty that is imposed on a railroad company or common carrier would be going too far. I

think sufficient security is afforded the public when owners or occupants of a building are required to use reasonable care in the character of the appliance they provide and in its maintenance and operation. The stairways are always open to those who deem this degree of diligence inadequate for their protection. The charge of the learned trial court was therefore erroneous.

Though what has been said disposes of the appeal, another question is presented to us, which, as it will arise on a new trial, we think proper to decide. By the written lease between the defendant and the insurance company it is provided that "the landlord shall not be responsible for any loss or injury arising from or during the use or operation of the elevator or the carelessness or negligence of any person." The appellant contends that by this provision he is exempt from any liability for the injuries to the plaintiff's intestate. The lease was ²⁰⁰ attested by the deceased as secretary of the company in accordance with its by-laws. It must be presumed, therefore, that he was aware of its contents and assented to its terms, if those terms affected him. But the lease does not purport to apply to the personal rights of the officers or employés of the lessee: Opinion of Allen, J., in *Blair v. Erie Ry. Co.*, 66 N. Y. 313, 23 Am. Rep. 55. There is this marked distinction between the present case and those in which the carrier has sought to be relieved from liability to a servant injured on a train, by virtue of the terms of some agreement with the employer, exempting the carrier from liability. In those cases the right of the employé to be on the train at all emanated from the contract made with his employer. Not so here. The right of the deceased to transportation in the elevator was based on the general invitation of the defendant to persons having business to transact in the building. The fact that he was in the employ of the tenant did not limit his rights.

The other exceptions argued by the learned counsel for the appellant relate to rulings that may not occur upon a new trial; and, therefore, do not require our notice; for the error in the charge already stated, the judgment should be reversed and a new trial granted, costs to abide the event.

GRAY, J. I concur with Judge Cullen's opinion, in so far as it holds that the judgment should be reversed and a new trial had for the error committed by the trial court in instructing the jury as to the degree of care which the defendant was bound to exercise.

I have grave doubts whether this is a case for the application of the rule "*res ipsa loquitur*," which has never been applied to this class of cases.

As it is unnecessary to our decision that the question of the application of the rule should be passed upon, I think it is wiser policy to reserve it for a future occasion.

BARTLETT, J., dissenting. I agree with Judge Cullen that the court was justified in permitting the jury to infer negligence from the accident.

²⁰¹ I also agree that the lease has no effect on plaintiff's right to recover.

I dissent from that portion of the prevailing opinion which holds the charge of the trial judge erroneous which instructed the jury that as to the machinery by which an elevator is moved and controlled the owner is bound to exercise the utmost care and diligence, and is liable for the slightest neglect against which human prudence and foresight might have guarded. In these days of lofty buildings and the annual transportation of millions of passengers in elevators by interested owners, who could not otherwise rent their property, public policy requires them to exercise the same degree of care as is imposed on common carriers.

Vann and Werner, JJ., concur with Cullen, J., for reversal.

Gray, J., reads concurring memorandum, with whom Parker, C. J., concurs.

Bartlett, J., reads dissenting memorandum, with whom Martin, J., concurs.

ELEVATORS—INFERENCE OF NEGLIGENCE FROM ACCIDENT—MAXIM, RES IPSA LOQUITUR.—There is a presumption of negligence from the fall of an elevator. Where negligence may be inferred from the facts and circumstances disclosed, in the absence of evidence showing that an injury occurred without the fault of the defendant, the case comes within the principle of *res ipsa loquitur*; the facts and circumstances speak for themselves, and, in the absence of explanation or disproof, give rise to the inference of negligence: See the extended note to *Huey v. Gahlenbeck*, 6 Am. St. Rep. 793, 794, discussing the presumption of negligence when an injury has been suffered, and there is no evidence showing who was at fault. See, also, *Esberg Cigar Co. v. Portland*, 34 Or. 282, 75 Am. St. Rep. 651, 55 Pac. 961.

ELEVATORS—OPERATION AND MAINTENANCE OF—DEGREE OF CARE REQUIRED.—That a person running an elevator in his place of business undertakes to carry safely persons riding therein, as fully as human care and foresight can do, and that he

is held to extraordinary diligence, and is liable for the slightest neglect in the management or care of such elevator, see the extended notes to *Bessemer Land etc. Co. v. Campbell*, 77 Am. St. Rep. 29, discussing diligence required when human life is involved; and *Southern etc. Loan Assn. v. Dawson*, 56 Am. St. Rep. 806-810, on the liabilities of owners of elevators used for passengers or employes.

COUNTRYMAN v. FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY.

[166 N. Y. 201, 59 N. E. 822.]

NEGLIGENCE ON ELECTRIC RAILWAY CAUSING DEATH—QUESTION FOR JURY.—Where a person, while riding in a cutter on a street railway track, from which a considerable body of snow had been cleared by throwing it upon the driveways on either side, was run down and injured by an electric-car coming up behind the cutter at such a high rate of speed as to give the driver little opportunity to escape a serious accident, the fact that the car did not strike the cutter does not necessarily relieve the railway company from a charge of negligence, where the jury might have found upon the evidence that the driver, in his effort to avoid instantaneous disaster, was compelled to turn rapidly to the right; that, while he succeeded in clearing the track, he upset the cutter in attempting to drive over a ridge of ice and snow lying between the track and the highway; and that an occupant of the cutter was thrown out when it tipped over, and was killed in consequence of being struck by the step or snow-scraper on the rear end of the car.

ELECTRIC RAILWAY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—When a person, during wintry weather, is driving in a cutter on a street railway track, over which electric-cars ordinarily pass every one-half hour, but a longer time elapses between cars during wintry weather, the degree of alertness required of the driver to prevent an accident is a question for the jury.

DAMAGES FOR NEGLIGENTLY CAUSING DEATH OF RELATIVE—QUESTION FOR JURY.—In a statutory action brought by the next of kin of a person negligently killed there may be a recovery of damages which are not capable of exact proof, being remote, uncertain, and not recognized by the common law. It is a question for the jury to determine, in the exercise of a reasonable discretion, what damages, in addition to actual money damages as proved, the next of kin of the intestate have suffered, if any, considering the situation as proved.

Action for negligently causing death. In the courts below there were judgments for the defendant, the trial court having dismissed the complaint, and the plaintiff appealed.

Clark L. Jordan, for the appellant.

A. D. L. Baker, for the respondent.

²⁰³ BARTLETT, J. This is an action by an administrator to recover damages for causing the death of his intestate, resulting from the alleged negligence of the defendant, brought under the provisions of the Code of Civil Procedure, sections 1902 to 1908.

On the morning of the third day of January, 1895, Christina Countryman, the deceased, was riding in a cutter with one Walter C. Coates, traveling in a southerly direction on Main street, in the city of Gloversville.

The defendant operated on that street, in the center thereof, a single-track electric railroad, there being sufficient space between the track and the curbstones on either side for the passage of vehicles.

On the day in question there was a considerable body of snow, which had been cleared from the track of the defendant ²⁰⁴ by depositing it to some extent upon the driveways on either hand. The day was cold and the deceased was bundled up in a shawl and cloak. Mr. Coates, who was about thirty-eight years of age, was driving his own horse, and his immediate errand was to take the deceased several miles into the country to the house of a friend. They were driving on the track of the defendant at a rate of speed that Coates testified was from eight to ten miles an hour.

It appears that the cars passed over this route about once every half hour, except that in wintry weather they were not so frequent. When a little south of Second avenue, which crosses Main street at right angles, Coates heard someone shout "Get off the track; the car is coming"; he states that up to that moment he had not heard the bell ring and did not know the car was approaching. An eye-witness testifies that the car was about seventy-five feet from the cutter at the time this warning was given.

There is a conflict in the evidence as to the speed of the car. One witness puts it as high as twenty miles an hour, but it may be fairly inferred from the testimony of plaintiff's witnesses that it was twelve miles an hour.

After Coates had been thus warned, what occurred may be given in his own language: "I looked around and saw the car coming. I pulled my horse quick to the west to get off the track; I think there was a team on the other side and I couldn't pull out there; on the east side I think there were teams, but I would not swear positively. Q. Tell what occurred. A. We turned there and the cutter tipped over. Q. Where did

it tip? Where with reference to the track that you turned out of, how near to that? A. I should not think that the hind runner was over a foot and a half or two feet from the track; it was very close to the car; I mean the hind end of the runner. Q. What did the runner strike, if anything? A. A ridge of snow at the west side of the track. Q. How far from the track? A. About eight or ten inches; something like that, I should think, from the rail. We measured the ridge in the afternoon and it was twelve inches above the ²⁰⁵ rail; we averaged it up at twelve inches right along there within a few feet. Some of the way it would be six or eight and ten and twelve inches; and some of the way fifteen inches. This ridge was hard, with a soft snow that came the night before, underneath it was hard snow and ice. When the cutter tipped over Mrs. Countryman fell out; she fell to the east with her head north and feet south; I think she had a shawl and cloak on."

This witness was asked on cross-examination if he had been going at a moderate gait whether he could have turned out, and he stated that if the horse had been on a slow walk and he had gotten up on the edge of the cutter it would not have tipped over. Coates further testified, in substance, that he did not think the car struck the cutter, but that Mrs. Countryman fell out on the side toward the car when they tipped over, and the step or the snow-scraper on the rear end of the car struck her in the head as she was lying upon the ground.

It appears that after the accident deceased was at once carried into the office of a physician near by, and it was ascertained that she was suffering from three fractures of the skull; she never regained consciousness and died a few hours later.

Dr. Furbeck, who witnessed the accident, testified that the car passed on beyond the point where the intestate was injured some one hundred and fifty or two hundred feet before it was stopped. The testimony of this witness does not vary, materially, as to the accident from Coates' account of it.

Harvey E. Cromwell was also a witness to the accident and testified that the car was going from ten to fifteen miles an hour, and stated that according to his very best judgment it was moving at the rate of twelve miles an hour. He placed the speed of the horse at from eight to ten miles an hour. He testified as follows (referring to Mr. Coates): "I saw him try to turn out, and I saw after he started to do so that the cutter began to slide on the first ridge of snow, and I should judge from the way it slid it struck a hard lump and tipped over.

After the cutter had entirely left the track, I should think the ²⁰⁶ hind end of the cutter might have been perhaps twelve or fifteen inches when it began to tip over before it made the second ridge. The lady fell out and struck directly on her back, and he fell out shortly afterward. . . . The forward scraper of the car struck the lady; the underside of the forward scraper. . . . The bell was not ringing when I first turned around; if it was I did not hear it; I heard the rumbling first. Q. How soon after you heard the rumbling and had turned around before you heard the bell? A. Within perhaps ten or fifteen feet; I did not hear anybody hallooing at all; I did not pay any attention to the motorman; I turned around to watch the people to see if they were going to get out safely."

On cross-examination the witness said: "I will simply swear that I did not hear it ring; I did not hear the bell ring; that was true at all points. . . . According to my best judgment the car was going twelve miles an hour."

Coates admits that prior to the time that he had received the warning from the passerby that the car was coming he had not been listening for it, had not looked back to see if it was coming; that he did not think anything about the bell or the car. Coates swore that he frequently drove upon the track and was familiar with the general situation.

As the nonsuit was granted at the close of the plaintiff's evidence, the inquiry is whether the record, as it then stood, presented a question for the jury. While there are six grounds on which the motion for nonsuit was based, they present but three propositions: 1. That plaintiff's intestate was guilty of contributory negligence as matter of law; 2. That no negligence was proven on the part of defendant; and 3. That no damages were proved.

We are of opinion that it was error on the part of the learned trial judge to dismiss the complaint, as there was sufficient evidence on all the points raised to entitle the plaintiff to go to the jury.

The trial judge before granting the motion for a nonsuit, said, among other things: "The way it strikes me is there is ²⁰⁷ a different state of facts presented here than there would be provided the car had actually struck the sleigh and overturned it. In that event the question of speed would be a more important matter. . . . How an accident of that kind could have been apprehended and how the speed of the car had

anything to do with such an accident, does not appear quite clear. . . . In any event, I do not see how the railroad company in its propulsion of the car at any rate of speed had anything to do with this accident."

The fact that the car did not strike the cutter does not necessarily relieve the railway company from the charge of negligence arising from the motorman approaching Coates and the intestate at a very high rate of speed, thereby putting them in great peril and giving the driver little opportunity to escape a serious accident. It was possible for the jury to find that Coates, in his effort to avoid instantaneous disaster, was compelled to turn rapidly to the right, and, while he succeeded in clearing the track, he upset the cutter in attempting to drive over the ridge of snow lying between the railroad track and the highway. It is described by one witness, as already pointed out, as a ridge some twelve inches in height, covered with a slight coat of new snow on top, while underneath it was hard snow and ice.

This court held in *Adolph v. Central Park etc. R. R. Co.*, 76 N. Y. 530, that it was the duty of one driving upon the track of a street railway company not only to turn off from the track when called upon by a servant of the railroad company, but to listen to whatever signal there may be from an approaching car, and he should also look behind him from time to time, so that he may, if a car is near, turn off and allow it to pass without hindrance or undue slackening of ordinary speed.

In the case at bar there is a qualifying fact, to wit, the infrequency of the cars passing over the route, it appearing in evidence that the headway was one in every half hour, and in wintry weather, such as existed at the time of the accident, a longer time elapsed between cars. It was for the jury to ²⁰⁸ say, under these circumstances, what degree of alertness would be required of a man in Coates' position.

As a new trial must be had, it is necessary to briefly consider the question of damages.

In an oral opinion delivered on dismissing the complaint the trial judge said, in part: "There does not seem to have been any property loss on the part of the next of kin of this deceased, as shown by the evidence in this case. There is no data upon which any property loss could be estimated by the jury. . . . But here is a woman without any children to whom she owes any duty; without the power to accumulate property,

simply earning her own living by housework. To say that these two children have suffered a property loss in dollars and cents from these facts, and leave it to the jury as pure guess-work, is something I do not understand the courts to permit."

It is true plaintiff failed to prove certain direct pecuniary damages that would have made up a part of the recovery in this case had the jury found in his favor, such as funeral expenses, doctors' bills, including the autopsy, and any other disbursements incident to the care of the deceased after the accident.

In regard to such damages, made up of actual disbursements, the jury is not allowed to guess or speculate, as they are easily proved, and no recovery beyond nominal damages can be had unless they are established by proper evidence: *Leeds v. Metropolitan Gas Light Co.*, 90 N. Y. 26, 29. In the case cited Judge Finch said: "Where the loss is pecuniary, and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only."

There are, however, in actions like the present, which is purely statutory, damages recoverable which are not capable of exact proof, being remote, uncertain, and not recognized by the common law.

This court, in a recent case, has considered the nature of this action and the measure of damages therein: ²⁰⁹ *Snedeker v. Snedeker*, 164 N. Y. 58, 58 N. E. 117. The case cited involved the question of the pecuniary interest of the father in the life of his son. The court pointed out that the statute evidently deals with remote and uncertain damages not recoverable at common law. It then states: "It might have happened had the son survived thirty years that his wife would have died childless, and he be left as the only support of an aged and penniless father; or, if no father was living, but several next of kin of the same degree, it is within the range of possibilities that the decedent might have accumulated within his added years of life a considerable estate and died leaving it to them."

In *Meekin v. Brooklyn Heights R. R. Co.*, 164 N. Y. 145, 79 Am. St. Rep. 635, 58 N. E. 50, it was held that this cause of action is a property right which is not affected by the death of the administrator, who was the sole next of kin of the decedent, but vested in his legal representatives.

In *Houghkirk v. Delaware etc. Co.*, 92 N. Y. 219, 44 Am. Rep. 370, Judge Finch said: "The statute implies from the

death of a person negligently killed, damages sustained by the next of kin. Recognizing the generally prospective and indefinite character of those damages, and the impossibility of a basis for accurate estimate, it allows the jury to give what they shall deem a just compensation," etc.

In the case at bar it is a question for the jury to determine, in the exercise of a reasonable discretion, what damages the next of kin of the intestate have suffered, if any, considering the situation as proved.

The deceased was a woman fifty-three years of age, leaving two children, a daughter twenty-two years old and a son of twenty-five. The mother supported herself as did the children.

It is for the jury to consider if the health of the daughter should fail whether the mother might not take her to her own home, nurse and care for her indefinitely. The same might be true of the son. In other words, they are permitted to consider in a reasonable way those prospective and indefinite damages arising from the death of a mother under these circumstances, in addition to the actual money damages as proved.

The judgments of the trial court and appellate division should be reversed and a new trial granted, with costs to abide the event.

Parker, C. J., Gray, Martin, Vann, Cullen and Werner, JJ., concur.

STREET RAILWAY COMPANIES—NEGLIGENCE OF, IS QUESTION FOR JURY, WHEN.—In an action against a street railway company to recover damages for personal injuries, the question of the company's negligence is for the jury, where it appears that the gripman ran his car at a high rate of speed, when the probable consequence would be a collision with wagons ahead on the track: *Thatcher v. Central Traction Co.*, 166 Pa. St. 66, 45 Am. St. Rep. 645, 30 Atl. 1048.

DAMAGES FOR INJURIES CAUSING DEATH—WHAT MAY BE CONSIDERED IN ESTIMATING.—Under the Virginia statute, the jury, in such cases, may award such damages as they may deem to be fair and just, and the South Carolina statute provides that "the jury may give such damages as they may think proportioned to the injury resulting": See the monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 376, showing the elements and measure of damages in actions for having caused the death of human beings. Compare the note to *Florida etc. R. R. Co. v. Foxworth*, 79 Am. St. Rep. 171.

WINNE v. WINNE.

[166 N. Y. 263, 59 N. E. 832.]

SPECIFIC PERFORMANCE—JUDICIAL DISCRETION.—The right to specific performance may be granted or withheld upon a consideration of all the circumstances and in the exercise of a sound discretion.

SPECIFIC PERFORMANCE OF AGREEMENT TO MAKE ONE AN HEIR.—When for any reason the enforcement of an agreement to make one an heir must be unfair, inequitable, or unjust, specific performance thereof should be denied.

SPECIFIC PERFORMANCE.—THE FACT THAT AN ACTION AT LAW cannot be maintained upon an agreement does not prevent a court of equity from enforcing it by specific performance.

SPECIFIC PERFORMANCE OF AGREEMENT TO MAKE ONE AN HEIR—WHEN PROPER.—If a childless woman enters into a written agreement with a boy's mother, for the benefit of the boy, who is an infant, to take the custody and control of the child, to keep, maintain, and educate him as her own, and, at her death, to give him all her property, "and make him her sole heir," if his mother will surrender to her his custody and control, and will have nothing more to do with him, the infant is entitled to a specific performance of the contract, where it has been fully performed by the boy and his mother and the promisor died intestate.

SPECIFIC PERFORMANCE—CONTRACT TO MAKE ONE AN HEIR.—An agreement made by a childless woman to maintain another's boy as her own child, and at her death to give the boy her property, is not impossible of performance because of the addition of the words, "and make him her sole heir."

CONTRACT TO MAKE ONE AN HEIR—STATUTE OF WILLS—CONFLICT.—An agreement made by a childless woman to maintain another's boy as her own child, and at her death to give him her property and make him her sole heir, does not conflict with the statute relating to wills and their execution, because the contract is not in the nature of a testamentary disposition of property, but is to be chiefly executed during the life of the promisor, with compensation to be made at her death.

CONTRACT TO MAKE ONE AN HEIR—CONSIDERATION—VALIDITY—PUBLIC POLICY.—An agreement made by a childless woman to maintain another's boy as her own child, and at her death to give him her property and make him her sole heir, is based upon a valuable and sufficient consideration, where the promisor, by virtue of her agreement, receives the custody, control and services of the boy during his minority, and is not invalid upon any principle of public policy.

Henry V. Borst and W. P. Hover, for the appellants.

Clark L. Jordan, for the respondent.

265 MARTIN, J. The purpose of this action was to enforce by specific performance a contract made by the defendants' intestate with the plaintiff's mother for his benefit. The

206 plaintiff was the son of Loren and Harriet Wetherbee. In 1870, while he was under the sole charge, custody, and control of his mother, she delivered him into the custody and control of Emily Goodemote, afterward known as Emily Winne, under and in pursuance of a written agreement made by and between Harriet Wetherbee, for the benefit of the plaintiff, and Emily Goodemote, with the consent of her husband. This agreement was left in the possession of Mrs. Winne, but after her death it could not be found. Notice to produce it was given to the defendants, who succeeded to the possession of her property and effects; it was not produced, and secondary evidence of its contents was given. By the terms of the agreement as thus proved, Mrs. Winne was to have, and the mother of the plaintiff was to surrender to her, the custody and control of the plaintiff; Mrs. Winne was to keep and maintain him as her own child, and at her death give him all her property and make him her sole heir, and his mother was to have nothing more to do with him. After this agreement was made the plaintiff's mother ceased to have or exercise any control, charge, or custody of him. He lived with Mrs. Winne until after he was twenty-one years of age, was given and accepted her name, performed the duties of a son, and the relations usually existing between parent and child existed between them and continued until her death, which occurred December 3, 1898. She died intestate, and at the time was the owner of the real estate described in the complaint, and had about five hundred dollars of personal property. The defendants are her heirs at law and next of kin, and as such claim to be entitled to all the property she possessed at the time of her death. The defendant Magdaline Winne is the administratrix of her estate, is in possession of the personal property left by her, and also has charge of the real estate. Loren Wetherbee, the plaintiff's father, died prior to the death of Mrs. Winne. The latter left no father, mother, child, nor descendant, and no child was born to her after such contract was made.

The foregoing, briefly stated, are the facts as found by the 207 learned trial judge. Upon those facts it was held that the contract was valid, was based upon a sufficient consideration, had been fully performed by the plaintiff and his mother, was binding upon the heirs and next of kin of the decedent, and that the plaintiff was entitled to a specific performance by the defendants of the contract of Mrs. Winne. From the judgment entered upon that decision the defendants appealed to

the appellate division, where the judgment was affirmed, and from that judgment the defendants Magdaline Winne, individually and as administratrix, Catherine Robb and Hannah Vunck have appealed to this court.

The proof was sufficient to justify the trial court in finding the facts contained in its decision, or to show that there was at least some evidence to support the facts found, and under those circumstances the findings of fact in the case are conclusive upon us. "Whether there was any evidence to support a fact found is a question of law, which, when the affirmance by the appellate division is not unanimous, we can review, but in no other way can we deal with a question of fact in a civil case, even if we think it has been improperly decided": *Ostrom v. Greene*, 161 N. Y. 353, 357, 55 N. E. 219, 220. While it is one of the prerequisites to the specific performance of an agreement that it shall be clearly proved and certain as to its terms, this rule is to be observed and enforced in the courts below which deal with the facts, and when such an agreement has been found and is certain in its terms as found, it must be taken as clearly established within the rule, and the findings are conclusive upon this court: *Dunckel v. Dunckel*, 141 N. Y. 427, 26 N. E. 405. Therefore, in the further discussion of the questions involved in this case, it must be assumed that the facts have been conclusively settled by the findings of the trial court.

The contention of the appellants is that the agreement found by the court was not a legal or binding agreement in law, that it cannot be enforced against the estate of the decedent, and that the evidence was insufficient to establish a valid agreement which a court of equity can specifically perform.

In discussing the first proposition, the appellants claim that ²⁶⁸ the agreement was impossible of performance, because one person cannot make another his heir unless of his own blood. In a sense that may be true, but as the court found that the agreement by Mrs. Winne was to maintain the plaintiff as her own child and at her death give him her property, the addition of the words, "and make him her sole heir," does not detract from the other words of the agreement. Therefore, so far as the appellants' contention rests upon the proposition that one cannot make another not of his own blood his heir it is of little moment. There are, however, cases where contracts in those words have been held valid and specific performance enforced.

In the further consideration of this question it must be assumed that this was an agreement upon the part of the intestate to take the custody and control of the plaintiff, to keep, maintain, and educate him as her own child, and at her death give him all her property. This agreement is clear, definite, certain, and was plainly understood, and the remedy sought is not for any reason unfair or inequitable. Under these circumstances we are unable to discover any principle upon which it can be properly held that this contract was not binding in equity or was not enforceable against her estate.

It has been suggested that such a contract might be in conflict with the statute relating to wills and to their manner of execution. This was not a contract in the nature of a testamentary disposition of the decedent's property. On the contrary, it was a contract to be chiefly executed during the life of the decedent, with compensation to be made at her death. It was a method adopted to provide for the payment by her for the custody, control, and services of the plaintiff during his minority. It may be observed, in passing, that the decedent before her death received the full consideration provided for by the agreement. The plaintiff was a considerate boy, discharging all the duties that a faithful son owes his parents. Not only during the years of his minority, but even after his marriage he continued to provide for and exercise that care over her which a dutiful child should. The plaintiff's mother ²⁶⁹ also surrendered up to the decedent the entire custody and management of her child, and "had nothing more to do with him." Thus both the plaintiff and his mother have fully performed the contract upon their part, so that as to them it is not executory, but has been fully executed. That there was a sufficient consideration for the agreement, we have no doubt.

In *Parsell v. Stryker*, 41 N. Y. 480, A let a farm to his grandson, the plaintiff, during the life of the lessor, on the condition that the plaintiff should occupy the place, the lessor to have possession of a portion of the premises, the lessee to do the work and have two-thirds of the produce and the lessor one-third, the farm to belong to the lessee on the death of the lessor. It was also agreed that this contract should be carried into effect by the lessor's making a will devising the farm to the lessee. Upon those facts this court held that the agreement was based upon a good consideration; that as there was no fraud or undue influence it was valid and should be enforced by compelling a conveyance from the heirs of the

Promisor or purchasers with notice, and that an action for specific performance by them could be maintained. The validity of such a contract, if sufficiently certain, was clearly recognized in *Stanton v. Miller*, 58 N. Y. 192, and again in *Shakespeare v. Markham*, 72 N. Y. 400.

In *Gall v. Gall*, 64 Hun, 600, 19 N. Y. Supp. 332, which was an action for specific performance, the principle of these cases was again asserted, but, as after the agreement in that case was made the promisor had married again and had issue, it was held the action could not be maintained because of the second marriage which was fatal to its enforcement, since it resulted in taking from a father his entire estate to the exclusion of his future wife and children, and, therefore, was inequitable and against public policy. In that case it was, however, said: "It is undoubtedly the settled law of this state that where a certain and definite contract is clearly established, even though it involves an agreement to leave property by will, and it has been performed on the part of the promisee, equity, in a case free from all objections on account of the adequacy of the ²⁷⁰ consideration or other circumstances rendering the claim inequitable, will compel a specific performance."

In *Gates v. Gates*, 34 App. Div. 608, 54 N. Y. Supp. 454, where a party, who had since died intestate, with the consent of his wife, entered into an agreement with the mother of an infant, whose father was dead, to make the child an heir, and to give him the same interest which a son would have in whatever property he owned or might have at the time of his decease, it was held that the child was entitled to such a share in his estate as a son would be entitled to as an heir, and, where the intestate died without issue or descendants, the child was entitled to the whole estate, subject to the dower interest of the widow.

Again, in *Brantingham v. Huff*, 43 App. Div. 414, 60 N. Y. Supp. 157, where there was a similar contract, it was held that the child could maintain an action in equity against the devisees and grantees of the promisor to compel the specific performance of the contract. The same doctrine was held in *Godine v. Kidd*, 64 Hun, 585, 19 N. Y. Supp. 335, *Schutt v. Missionary Soc.*, 41 N. J. Eq. 115, 3 Atl. 398, and *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107.

But it is said that the case of *Hayden v. Hayden*, 8 App. Div. 547, 40 N. Y. Supp. 865, holds a contrary doctrine; yet when that case is examined it will be found that the only question which was actually decided was whether, under an agreement to

support an infant as a son, the latter could, after reaching the age of nineteen years, sustain an action to compel the promisor to pay for his further support. The court held that it did not appear but that the defendant, under the same circumstances, would have compelled his own son to support himself, and as the plaintiff could not claim any other or greater privilege or advantage than the defendant's child might lawfully or rightfully have claimed, the action could not be maintained. Thus it is apparent that the principle of that decision has no application here.

The intestate had no children, and hence this agreement cannot be regarded as invalid upon any principle of public policy, which might prevent the enforcement of an agreement which should result in the exclusion of children from ²⁷¹ the estate of their parents. The authorities to which we have referred amply sustain the doctrine that the specific performance of such a contract may be enforced if the transaction is free from fraud, overreaching, or other objections which generally prevent the granting of equitable relief, and fully justify the decision of the courts below.

Nor is it a bar to the granting of such relief that an action at common law could not be maintained upon the agreement. There are many contracts upon which an action at law cannot be maintained, which are enforced in equity by a decree for specific performance. Indeed, the inadequacy of a legal remedy is one of the considerations upon which this branch of equity jurisprudence is founded and the equitable remedy frequently enforced. "The inadequacy of the legal remedy may consist in the fact either that no action will lie at law, or that damages would not afford an adequate compensation": 2 Beach on Modern Equity Jurisprudence, sec. 636. "There are agreements which the common law, by virtue of its own doctrines, irrespective of statutory regulation, treats as invalid, as not contracts, and for which it furnishes no remedy; but which equity, in the application of its conscientious principles, considers as binding, and enforces by awarding its relief of a specific performance": Pomeroy on Specific Performance, sec. 31.

The principle that a suit in equity may be maintained for the specific performance of an agreement, although an action at law could not be based upon it, is illustrated by cases of the transfer of possibility or expectancy of estates, assignments of things in action, contracts of married women, agreements invalid under the statute of frauds, agreements for the sale of

land where the death of the vendor ensues before completion, agreements between a man and woman who afterward marry, and verbal contracts which have been partially performed. In these and in many other cases, although an action at law could not be maintained, courts of equity hold such contracts as binding and decree their specific performance if free from objections which would generally prevent equitable relief: *Chase v. Peck*, 21 N. Y. 581; *Husted v. Ingraham*, ²⁷² 75 N. Y. 251; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Perry v. Board of Missions etc. of Albany*, 102 N. Y. 99, 6 N. E. 116; *Smith v. Smith*, 125 N. Y. 224, 26 N. E. 259; *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000; *Roberge v. Winne*, 144 N. Y. 709, 39 N. E. 631. Hence, the fact that an action at law cannot be maintained upon an agreement does not prevent a court of equity from enforcing it by specific performance. In this case a suit in equity was doubtless the only remedy the plaintiff had, and unless this action can be maintained and the judgment upheld, he is remediless, although the agreement has been fully and faithfully performed by him and his mother, and every principle of good conscience and natural justice requires its performance by the heirs at law and next of kin of the decedent.

The right to the specific performance of a contract rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances and in the exercise of a sound discretion: *Seymour v. Delancey*, 6 Johns. Ch. 222; *Margraf v. Muir*, 57 N. Y. 155; *Conger v. New York etc. R. Co.*, 120 N. Y. 29, 23 N. E. 983; *Stokes v. Stokes*, 155 N. Y. 590, 50 N. E. 342.

Therefore, in cases of this character, where it appears for any reason that the enforcement of an agreement would be unfair, inequitable, or unjust, the remedy should be denied. Each case must be governed by its own facts and circumstances, and unless the proof discloses a situation where good conscience and natural justice require the enforcement of the agreement, this relief should not be awarded. The obvious purpose of Mrs. Winne in entering into this contract was to secure to herself not only the prospective services, but also the enjoyment of the society of the plaintiff as her own child, with the hope that she might thus gratify her motherly love and rear to manhood one who would prove worthy of her bountiful care. In this she was not disappointed. If, however, the plaintiff, instead of following her admonitions, and thus becoming an

upright and respected man, had become dissolute or otherwise led an unworthy life, and thus entailed upon her sorrow and disgrace, the court might well have refused this relief.

²⁷⁸ It is true that to authorize a court of equity to exercise its jurisdiction compelling the specific performance of a contract, "it must be reasonably certain as to its subject matter, its stipulations, its purposes, its parties, and the circumstances under which it was made": 3 Pomeroy's Equity Jurisprudence, sec. 1405; *Stokes v. Stokes*, 148 N. Y. 716, 43 N. E. 211. But it is to be remembered that the rule as to clearness of proof and certainty of terms is one to be observed and enforced by the courts below which deal with the facts, and when such an agreement has been found and there is any evidence to support the findings, and as found it is certain in its terms, it must be taken as clearly established, and the findings are conclusive upon this court: *Dunckel v. Dunckel*, 141 N. Y. 427, 36 N. E. 405. When the agreement as found in this case is tested by that rule, it answers all its requirements and justifies the conclusion that specific performance should be decreed. The agreement as found was based upon a valuable consideration, was reasonably certain as to its subject matter, as to its stipulations, its purposes, its parties, and the circumstances under which it was made.

While we are of the opinion that specific performance of this contract was properly awarded, this decision is based solely upon the findings of the trial court, and the particular facts and circumstances of this case. Yet, it must not be regarded as an authority for maintaining such an action under different circumstances or upon other proof, as the granting or denial of such relief always rests in the sound discretion of the court, and should be denied unless the agreement is fair and just and its enforcement equitable.

We have carefully examined all the exceptions to the rejection and admission of evidence to which our attention has been called, but have found none which would justify a disturbance of the judgment appealed from.

The judgment should be affirmed, with costs.

Parker, C. J., Bartlett, Cullen, and Werner, JJ., concur.

Gray and Vann, JJ., dissent.

SPECIFIC PERFORMANCE RESTS IN THE SOUND DISCRETION of a court of equity. It is a matter of grace and not of right, and will never be decreed where the equity of the case is

not clear: *Ryan v. McLane*, 91 Md. 175, 80 Am. St. Rep. 438, 46 Atl. 340.

SPECIFIC PERFORMANCE OF CONTRACT TO MAKE ANOTHER'S CHILD AN HEIR.—If a husband and his wife, having no children, agree with the mother of a little girl eleven years of age that, if the child will come and live with them, at their home, the husband will, in return for her companionship and obedience, leave her a child's share of his estate at his death, such contract is based upon a sufficient consideration for the promise, and, if the husband dies, without having made such provision, a court of equity will decree its specific performance against his estate, where the contract is clearly proved and shown to have been complied with on the part of the child, although the agreement contained an invalid contract of adoption: *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

NORTHAM v. DUTCHESS COUNTY MUTUAL INSURANCE COMPANY OF POUGHKEEPSIE, NEW YORK.

[166 N. Y. 319, 59 N. E. 912.]

FIRE INSURANCE — ASSIGNMENT FOR CREDITORS.—If an insured person makes a general assignment for the benefit of his creditors, the assignment makes such a change in the title and interest of the insured as will render the policy void, unless it is saved by estoppel or waiver.

FIRE INSURANCE — CHANGE OF TITLE — WAIVER — ESTOPPEL.—When the subject of fire insurance has been assigned by the insured, before a loss, for the benefit of his creditors, and without the company's consent, indorsed upon or added to the policy, a waiver of its conditions as to change of title is not established by evidence that, after the assignment and before the fire, the insured notified the company's agent that the assignment had been made; that the assignee wanted the insurance kept good and promised to pay a balance of premium due, but that he did not have the policy with him; that the agent replied: "I will see that the insurance is all right," and to the effect that the assignee should have the benefit of it; and that the remainder of the premium was not paid before the fire. Nor do such facts authorize the application of the doctrine of estoppel.

Action upon a policy of insurance, brought by Lewis N. Northam, as assignee for the benefit of the creditors of Wallace G. Northam. There was a judgment for the plaintiff. This was affirmed by the appellate division and the company appealed.

Horace McGuire, for the appellant.

N. F. Breen and A. H. Sawyer, for the respondent.

821 LANDON, J. The action is upon a New York standard policy of fire insurance issued and delivered by the defendant to the plaintiff's assignor, Wallace G. Northam, August 4, 1898, for one thousand dollars upon a hotel or summer boarding-house, and one thousand dollars upon the furniture therein. The plaintiff's assignor was in possession of the insured property under a lease for five years and a contract for its purchase at his option. The policy stated, "Held on contract; loss, if any, payable as interest may appear." On August 17, 1898, the insured made a general assignment for the benefit of his creditors to the plaintiff. On September 4, 1898, the insured property was destroyed by fire. It was admitted upon the trial that the plaintiff was entitled to recover the face of the policy, if entitled to any recovery.

The policy contained these provisions:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if any change other than by the death of the insured take place in the interest, title, or possession of the subject of insurance (except change of occupancy without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise, or if this policy be assigned before a loss."

"This policy is made and accepted subject to the foregoing stipulations and conditions and such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may **822** be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached."

The main question in this case is whether the general assignment by the insured for the benefit of his creditors to the plaintiff, of the subject of the insurance, before the fire occurred, without the consent of the defendant indorsed upon the policy or added to it, made the policy void under the provisions above quoted. The general assignment for the benefit of creditors made the plaintiff the trustee of an express trust,

and by statute, so far as real estate was transferred, vested the title in the assignee, subject only to the execution of the trust: Real Property Law, c. 547, secs. 76, 80, Laws 1896. The title to the personal property in like manner vested in the assignee, since in respect of personal property such would be the effect of the assignment in the absence of any statute to the contrary. As trustee of an express trust the general assignee may sue without joining with him the person for whose benefit the action is prosecuted: Code Civ. Proc., sec. 449. The plaintiff contends that the action is for the benefit of the assignor. Assuming, without deciding, this to be true, the general assignment made a change in the title of the assignor. Before the assignment he was absolute owner of his own interest in the subject of the insurance; after the assignment the assignee was vested with the title thereto, subject to the execution of the trust, and the assignee was a cestui que trust as to a possible balance remaining after the claims of creditors had been satisfied. Within the letter of the provision of the policy a change was made in the title and interest of the assured: *Perry v. Lorillard Fire Ins. Co.*, 61 N. Y. 214, 19 Am. Rep. 272. The case cited was an assignment in bankruptcy by the register to the assignee selected by the creditors after an adjudication ³²³ in involuntary proceedings, declaring the insured a bankrupt. In such a case, the bankruptcy proceedings result in discharging the debtor from his debts, while in the case before us, such discharge is not made except by full payment, but we do not think this distinction material. In both cases the assignee is a trustee for the purposes of the trust, and if by an unexpected rise in values the assets in either case should leave a surplus after payment of the debts, we do not doubt the debtor would be entitled to it.

In framing this provision the insurer has in mind the moral risk which experience shows is not the same with all persons, and which may change with a change of circumstances. This is material, and, we think, brings this kind of change of title within the spirit of the provision. The policy is, therefore, void unless saved by estoppel or waiver: *Moore v. Hanover Fire Ins. Co.*, 141 N. Y. 224, 36 N. E. 191, and cases there cited.

Each party moved for a verdict, and the court thereupon directed a verdict for the plaintiff. We must, under the defendant's exceptions, ascertain whether there is any evidence to support the finding of waiver or estoppel. The defendant's agent, we may assume, had the power by a proper writing

indorsed upon the policy to give the defendant's consent to the change of title or to waive its objection to it.

The premium upon the policy was forty dollars, twenty of which were paid when the policy was issued. The remainder was not paid before the fire. The assignor testified that after the assignment and before the fire, at the request of the assignee, he saw the defendant's agent and told him that he had made a general assignment to the plaintiff; that the plaintiff wanted the insurance kept good; that plaintiff said he would pay the balance of the premium. The witness told the agent that he did not have the policy with him because it was locked up in a safe which he could not open. The agent replied: "I will see that the insurance is all right," and to the effect that the assignee should have the benefit of it.

This falls short of the facts which sustained the policy in *Manchester v. Guardian Assur. Co.*, 151 N. Y. 88, 56 Am. St. Rep. 600, 45 N. E. 381. In that ³²⁴ case the agent agreed to make the necessary indorsement and failed to do so, although the policy was within his reach for the purpose. The promise under the circumstances was held to be either the equivalent of an oral contract for further insurance, or an estoppel precluding the defendant from asserting its own breach of performance. The case before us is not unlike *Baumgartel v. Providence etc. Ins. Co.*, 136 N. Y. 547, 32 N. E. 990, in which the agent, when informed by the insured that he had obtained other insurance for one thousand dollars, answered, "All right, I will attend to it"; and we held this was not a compliance with the terms of the standard policy or waiver of them, but at best but a promise to make the proper indorsement when the policy should be presented to the agent, an event which did not occur in that case or in this.

We have recently affirmed upon the opinion below a judgment in favor of this plaintiff against another company which had issued a policy upon the same property: *Northam v. International Ins. Co.*, 45 App. Div. 177, 61 N. Y. Supp. 45, 165 N. Y. 666, 59 N. E. 1127. The defendant relied upon the same general assignment without waiver or approval indorsed upon the policy or added to it. But in that case the assignee, after the assignment, although he did not present the policy to the agent, did pay him fifteen dollars, the unpaid portion of the premium, upon the agent's representation that in such case it would be all right and the policy would continue, the agent also giving to the assignee a receipt stating it to be for

the balance of the unpaid premium upon the policy. We held that the defendant was equitably estopped from interposing the condition of the policy. Moreover, the fact might have been found that the receipt was given to be added or attached to the policy. The facts upon which that case was upheld illustrate the defects of the one before us.

The judgment must be reversed, a new trial granted, costs to abide the event.

Parker, C. J., Gray, O'Brien, and Werner, JJ., concur.

Haight and Cullen, JJ., dissent.

INSURANCE.—A VOLUNTARY ASSIGNMENT FOR THE BENEFIT OF CREDITORS, executed in the mode prescribed by statute, is a breach of a condition in a policy of insurance providing that if the property or any interest therein be sold or transferred, or any change takes place, other than by the death of the assured, in the interest, title, or possession, whether by legal process or judicial decree, or voluntary transfer by the assured, then in such case the policy shall be void: *Orr v. Hanover Fire Ins. Co.*, 158 Ill. 149, 49 Am. St. Rep. 146, 41 N. E. 854. But see *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686, 12 Atl. 668, showing what will waive a forfeiture of a policy, assigned before a loss, without permission of the company therefor indorsed on the policy; and *Manchester v. Guardian Assur. Co.*, 151 N. Y. 88, 56 Am. St. Rep. 600, 45 N. E. 381, showing what will constitute a waiver of a written indorsement of a change in ownership.

GEISZLER v. DE GRAAF.

[166 N. Y. 339, 59 N. E. 993.]

A COVENANT AGAINST ENCUMBRANCES ATTACHES TO AND RUNS WITH THE LAND AND PASSES to a remote grantee through the line of conveyances, whether there is a nominal breach or not when the deed is delivered.

COVENANT AGAINST ENCUMBRANCES—EXTINGUISHMENT OF, BY AN INTERMEDIATE PURCHASE SUBJECT TO A LOCAL ASSESSMENT.—If land encumbered by a local assessment is conveyed with a covenant against encumbrances, and is afterward purchased subject to the assessment, the effect of such purchase is to extinguish the benefit of the covenant. Hence, a subsequent grantee, who acquires title under a deed containing a new covenant against encumbrances, cannot maintain an action against the original grantor upon the old covenant.

There was a judgment in favor of the plaintiff, which was reversed by the appellate division, and a new trial granted. The plaintiff appealed.

Frank L. Holt and Isaac N. Miller, for the appellant.

George C. Lay, for the respondents.

³⁴⁰ O'BRIEN, J. The plaintiff is the remote grantee of lands which the defendants' testator owned on the twenty-ninth day of January, 1892, and on that day conveyed to one Knabe by deed with full covenants. At the time of this conveyance the lands were encumbered by a local assessment amounting to two hundred and twenty-four dollars and forty-one cents, with interest. On the twelfth day of March, 1892, Knabe conveyed the lands to one Breirly, expressly subject to the assessment, and on the second day of October, 1893, the ³⁴¹ latter conveyed to the plaintiff with a covenant against encumbrances. On the twenty-third day of October, 1896, the plaintiff was obliged to and did pay the assessment, amounting at that date to three hundred and forty-one dollars and thirty-one cents, in order to discharge the lien upon the land, and he now seeks to recover that sum with interest from the personal representatives of the original grantor from whom the title was derived.

The plaintiff cannot recover without establishing two propositions of law: 1. That the benefit of the covenant against encumbrances contained in the deed of the defendants' intestate to Knabe passed to the plaintiff through the intermediate conveyances. In other words, that it ran with the land. 2. That the continuity of the covenant was not interrupted or its benefits extinguished as to the plaintiff by the fact that his immediate grantor took the title expressly subject to the assessment or encumbrance which is the basis of the action.

The right of a remote grantee of real estate to recover damages for breach of the covenants in the deed has been exhaustively discussed in a recent case in this court, and the point in that case was settled only after four appeals and then by a bare majority of this court. But in that case the question that we are now concerned with was not involved, since the action was upon the covenant for quiet enjoyment and warranty made by a stranger to the title, and it was held that under the circumstances of the case the covenant of the stranger was personal and did not run with the land. The case turned upon the point that there was no such privity of estate or contract between the husband who had joined with the wife in the covenant and the plaintiff as would attach the covenant to the land and carry liability through the chain of title to a remote grantee: *Mygatt v. Coe*, 152 N. Y. 457, 57 Am. St. Rep. 521,

46 N. E. 949; 147 N. Y. 456, 42 N. E. 17; 142 N. Y. 78, 36 N. E. 870; 124 N. Y. 212, 36 N. E. 611. That was a very different question from the one now before us, which is simply whether the covenant against encumbrances runs with the land so as to enable a remote grantee to recover upon it.

We can decide the case upon another question, comparatively insignificant, and leave the principal controversy open ~~342~~ for litigants to grope their way through conflicting decisions to some conclusion as to what the law is on the subject. But the right of a remote grantee to recover for breach of the covenant against encumbrances is a question arising almost every day, and a court of last resort should meet it when presented and settle the law one way or the other.

It was the general rule of the common law that all covenants for title ran with the land until breach. In this state it has been held that a breach of the covenants of seisin, of right to convey and against encumbrances occurred, if at all, upon delivery of the deed; while those for quiet enjoyment, warranty, and for further assurance were not broken until an eviction, actual or constructive: Rawle on Covenants, 5th ed., sec. 202 and note. And it has been generally held that those of the former class do not run with the land, while the latter do. The foundation of this distinction is not clearly traceable among the early English decisions. The principal reason for it, however, seems to have been that at common law no privity of estate or tenure existed between a covenantor and a remote covenantee, and, therefore, when a breach of a covenant of title occurred, if it was not such a covenant as was affixed to the land and ran with it, it could not be taken advantage of by a remote covenantee or a stranger to the original covenant, since it was, as to him, a mere chose in action, and at common law choses in action were not assignable. But now choses in action are assignable, and the question is whether the ancient law concerning the covenant against encumbrances has survived the reasons upon which it was founded. The operation of the common-law rule upon the grantee seeking to enforce the covenant against encumbrances was always inconvenient, and the rule itself exceedingly illogical. While it was held that the breach occurred upon delivery of the deed, it was also held that the covenantee could not recover more than nominal damages until he had paid off the encumbrance, or had been actually or constructively evicted: *Delavergne v. Norris*, 7 Johns. 358, 5 Am. Dec. 281; *Hall v. Dean*, 13 Johns. 105; *Stanard v. Eldridge*,

16 Johns. 254; ³⁴³ Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384; McGuckin v. Milbank, 152 N. Y. 297, 46 N. E. 490. It was virtually held that when the encumbrance was a money charge which the grantee could remove, there were two breaches of the covenant, one nominal, entitling the party to but nominal damages, and the other substantial, to be made good by the actual damages sustained and an action and recovery for the first breach was no bar to an action and recovery for the second: Eaton v. Lyman, 30 Wis. 41, 33 Wis. 34.

This rule did not apply to permanent encumbrances which the covenantee could not remove, such as easements and the like, since he had the right in those cases to bring his action immediately on the breach and recover just compensation for the real injury. A learned writer, commenting on the condition of the law of covenants as it formerly existed, stated the situation quite accurately in the following language: "It is evident from these cases that the current of American authority tends, with but little exception, toward the position that on total breach a covenant, though annexed to the realty, becomes a merely personal right, which remains with the covenantee or his executors, and does not descend with the land to heirs, nor run with it on any future assignment to third parties. The result of this doctrine, as generally applied in this country, is to deprive covenants which, like those for seisin or against encumbrances, if not good, are broken instantaneously, of all efficacy for the protection of the title, in the hands of an assignee, even when the loss resulting from the breach has fallen solely upon him. Thus the right of action on covenants, originally intended for the benefit of the inheritance in all subsequent hands, is denied under this course of decision, to the purchaser of the land, although the party really injured": 1 Smith's Leading Cases, 192, note by Hare & Wallace. In England the law became so uncertain in this respect, as the result of conflicting decisions (Kingdon v. Nottle, 1 Maule & S. 355, 4 Maule & S. 53; Spoor v. Green, L. R. 9 Ex. 99), that the controversy was set at rest by the enactment of a statute which provided that the covenants should ³⁴⁴ run with the land unless otherwise restricted in the conveyance: 44 & 45 Victoria, c. 41, sec. 7. The same result has been accomplished in most of our sister states, either by judicial decision or by statute, where the covenant against encumbrances runs with the land.

In this state, since the enactment of the code making choses in action assignable, it has been held that the covenant against encumbrances passes with the land through conveyances to a remote grantee: *Coleman v. Bresnahan*, 54 Hun, 619, 8 N. Y. Supp. 158; *Clarke v. Priest*, 21 App. Div. 174; 47 N. Y. Supp. 489. But it has been held in the case at bar that it does not, and that proposition is based upon the common-law rule and upon a former decision of the same court: *Seventy-third Street Bldg. Co. v. Jencks*, 19 App. Div. 314, 46 N. Y. Supp. 2. With this conflict of views concerning the nature and effect of the covenant against encumbrances, and the remedy for a breach of it, this court should adopt the rule best adapted to present conditions and which seems most likely to conform to the intention of the parties and to accomplish the purpose for which the covenant itself is made. The covenant is for the protection of the title, and there is no good reason why it should not be held to run with the land, like the covenant of warranty or quiet enjoyment. The principle which was at the foundation of the common-law rule, that choses in action were not assignable, having become obsolete, there is no reason that I can perceive why the rule should survive the reason upon which it was founded.

We hold, therefore, that the covenant against encumbrances attaches to and runs with the land and passes to a remote grantee through the line of conveyances, whether there is a nominal breach or not when the deed is delivered.

But in this particular case there is a fatal obstacle to the plaintiff's right to recover upon the covenant. The plaintiff's immediate grantor, as we have seen, purchased expressly subject to the encumbrance, and while he owned the land he could not take advantage of the original covenant made by the defendants' testator. The effect of his purchase, subject to the assessment, was to relieve the prior grantors from any ³⁴⁵ liability to him on the covenant. Presumptively, he was allowed in the purchase to deduct the amount of the assessment from the purchase price, and he was, therefore, furnished by his grantor with the money to pay the assessment, and when he took the land and was furnished with the money to pay the encumbrance the obligation of the covenant was discharged and extinguished. He could not call upon any prior covenantor to pay the assessment, when they had furnished him with the funds to pay it himself: *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195.

It is true that he did not pay, but conveyed to the plaintiff with a covenant against encumbrances. But the plaintiff acquired only such rights as his immediate grantor could assert against prior grantors. The plaintiff's grantor did not transmit to him any cause of action against the defendants. The covenant in the plaintiffs' deed is a new covenant, and not the assignment of an old one. On the new covenant the plaintiff's grantor is liable, but the liability extends only to him and cannot, through him, extend to prior parties. The plaintiff is under the same disability as his grantor, since he is in privity with him.

For these reasons the order should be affirmed and judgment absolute ordered for defendants on the stipulation, with costs.

Parker, C. J., Haight, Landon, Cullen, and Werner, JJ., concur.

Gray, J., concurs in result.

What Covenants Run With the Land.*

General Principles.—The fundamental distinction between real and personal covenants is, that the former run with the land, inuring to the benefit of, or becoming binding upon, subsequent grantees, while the latter do not run with the land, and are binding only upon the covenantor and his personal representatives, and in favor of the covenantee: See the monographic note to *Morse v. Garner*, 47 Am. Dec. 570, discussing real and personal covenants. It is an essential quality of a real covenant that it relate to the realty, having for its object something annexed to or inherent in, or connected with land or other real property: *Morse v. Garner*, 1 Strob. 514, 47 Am. Dec. 565. All covenants in deeds for the conveyance of lands which have respect to the title, and which were not broken when the land descended to the heir or passed to the assignee, are inherent or real covenants and attend the land; and on a breach happening, the heir or assignee injured thereby may sue the warrantor, his executor, or administrator, for the recovery of damages for such breach: *King v. Kerr*, 5 Ohio, 154, 22 Am. Dec. 777. A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land: *Savage v. Mason*, 3 Cush. 500, 505; *Platt v. Eggleston*, 20 Ohio St. 414, 419; *Wiggins Ferry Co. v. Ohio etc. Ry. Co.*, 94 Ill. 83; *Dorsey v. St. Louis etc. R. R. Co.*, 58 Ill. 65; *Gilmer*

*REFERENCES TO MONOGRAPHIC NOTES.

Covenant running with the land: 56 Am. Rep. 151-167.

Real and personal covenants: 47 Am. Dec. 569-577.

Covenants restricting the use of land: 21 Am. St. Rep. 484-508.

Law of party-walls: 92 Am. Dec. 289-306.

Contracts in restraint of trade: 59 Am. Rep. 636-694.

v. Mobile etc. Ry. Co., 79 Ala. 569, 58 Am. Rep. 263. The first criterion by which to determine whether a given covenant runs with the land or not is the nature and purpose of the covenant, and where this is not decisive, the intent of the parties, as expressed in their deed, will determine the question: Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550.

A covenant which may run with the land must have relation to the interest or estate granted and the act to be done must concern the interest created or conveyed: Conduitt v. Ross, 102 Ind. 166, 26 N. E. 198; Wells v. Benton, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601; Indianapolis Water Co. v. Nulte, 126 Ind. 373, 26 N. E. 72; Wheeler v. Schad, 7 Nev. 204. "Such covenants, and such only, run with land as concern the land itself, in whosoever hands it may be, and become united with, and form a part of, the consideration for which the land or some interest in it is parted with between the covenantor and covenantee": Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611, per Earl, C., quoting from Washburn on Real Property. In order that a covenant may run with the land, its performance or nonperformance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or it must affect the mode of enjoyment: Wiggins Ferry Co. v. Ohio etc. Ry. Co., 94 Ill. 83, 91. And not only must the covenant concern the land, but there must also be a privity of estate between the contracting parties: Wiggins Ferry Co. v. Ohio etc. Ry. Co., 94 Ill. 83, 91; Wheeler v. Schad, 7 Nev. 863; but see the discussion in Mygatt v. Coe, 142 N. Y. 78, 36 N. E. 870; Ross v. Turner, 7 Ark. 132, 44 Am. Dec. 531; Brewer v. Marshall, 18 N. J. Eq. 337; Conover v. Smith, 17 N. J. Eq. 51, 86 Am. Dec. 247; Trustees v. Lynch, 47 How. Pr. 273, 274; Glenn v. Canby, 24 Md. 127. The covenant runs if there is a privity of estate: Savage v. Mason, 3 Cush. 500, 505; Morse v. Aldrich, 19 Pick. 449; Easter v. Little Miami R. R. Co., 14 Ohio St. 48, 52; Denman v. Prince, 40 Barb. 213, 216; Gilmer v. Mobile etc. Ry. Co., 79 Ala. 569, 58 Am. Rep. 623; otherwise not: Hurd v. Curtis, 19 Pick. 459; Bronson v. Coffin, 118 Mass. 156, 163; Barkley v. Steers, 47 La. Ann. 951, 17 South. 438; Miller v. Noonan, 12 Mo. App. 370, 83 Mo. 343. It is not necessary that privity of estate, within the meaning of the feudal law, mutuality, should exist between the covenantor and the covenantee or his successors in interest to carry a covenant of warranty to subsequent grantees; but, unless there is either mutuality or succession of interest, this covenant will not run with the land: Mygatt v. Coe, 124 N. Y. 212, 26 N. E. 611; compare the same case, 142 N. Y. 78, 36 N. E. 870. On the third hearing of this case, O'Brien, J., in rendering the opinion of the court and in speaking of the words "heirs and assigns," said: "Whatever confusion may exist in the cases with reference to the use of these words, it is clear that they cannot dispense with some privity

of estate in order to carry the covenant (one of warranty and quiet enjoyment) with the land, and it has never been held that a covenant which, in its nature or otherwise, is personal, is made to run with the land by the mere employment of these words": *Mygatt v. Coe*, 147 N. Y. 456, 467, 42 N. E. 17. There is a growing tendency, however, to incorporate equitable doctrines with common-law rules, and, in equity, covenants relating to land, or its mode of use or enjoyment, are frequently enforced against subsequent grantees with notice, though there is no privity of estate, and the covenants do not strictly run with the land. A covenant concerning land or its use may be enforced, in equity, irrespective of the question as to whether the covenant is or is not one which runs with the land: *Kettle River R. R. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469. The equitable doctrine announced in *Tulk v. Moxhay*, 2 Phill. 774, is, that a covenant between a vendor and a purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice. Under this rule covenants are sustained and enforced against assignees with notice stipulating for a particular mode of improvement, occupation, or use of lands, and it is especially applicable to restrictive covenants; thus, covenants in respect to the mode of building or occupying parts of a once common estate; certain stipulations made by the owners or in deeds as to the use of ways; for light and air, etc.; reserving premises exclusively for dwelling-houses; prescribing manner of improvements; not to carry on particular trades or business, as, for instance, not to use premises for the sale of intoxicating liquors, or for an inn, tannery, gas-house, etc. Such privileges or restrictions, which are sometimes called equitable easements, servitudes, or amenities, are enforced by injunction irrespective of the question of privity of estate, or the nature of the tenure, but they must be such as relate to or concern the land, or its use or enjoyment. It is not enough that a covenant affects the use of land, or the enjoyment of an easement therein, or the value or profitableness of the use thereof, in a collateral way: *Kettle River R. R. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469, per Vanderburgh, J., rendering the opinion of the court. In addition to the authorities cited by the learned judge, see, also, the following authorities which support the same doctrine, that is, that a covenant may be enforced in equity whether it runs with the land or not, according to the intention of the parties: *Bald Eagle etc. R. R. Co. v. Nittany Valley R. R. Co.*, 171 Pa. St. 284, 50 Am. St. Rep. 807, 33 Atl. 239; *Lewis v. Gollner*, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81; *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; *Godfrey v. Black*, 39 Kan. 193, 7 Am. St. Rep. 544, 17 Pac. 849; *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; *Landell v.*

Hamilton, 175 Pa. St. 327, 34 Atl. 663; *Brown v. McKee*, 57 N. Y. 684; *Spencer v. Stevens*, 41 N. Y. Supp. 39; 18 Misc. Rep. 112; monographic note to *Ladd v. Boston*, 21 Am. St. Rep. 484-508, on covenants restricting the use of land; *Middletown v. Newport Hospital*, 16 R. I. 319, 15 Atl. 800.

If a covenant capable of running with the land relates to a thing in esse, the assigns of the covenantor are bound, though he has not named his heirs and assigns, and has not covenanted on their part: *Winfield v. Henning*, 21 N. J. Eq. 188; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175; *Denman v. Prince*, 40 Barb. 213, 217; *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550; but a covenant which relates to a thing not in esse, but to be done upon land, and therefore running with it, does not bind heirs and assigns unless they are named therein: *Gulf etc. Ry. Co. v. Smith*, 72 Tex. 122, 9 S. W. 865; *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282; *Lynn v. Mount Savage etc. R. R. Co.*, 34 Md. 603, 635; *Tallman v. Coffin*, 4 N. Y. 134; *Thompson v. Rose*, 8 Cow. 266; *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489, 506; *Doughty v. Bowman*, 11 Q. B. 444, 454; *Wilson v. Hart*, 1 Ch. App. 463; *Spencer's Case*, 5 Coke, 16a; *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247; and a covenant in which the assignee is not specifically named, though it is for a thing not in esse at the time, will bind him if it affects the nature, quality, or value of the thing demised, independently of collateral circumstances, or if it affects the mode of enjoying it: *Mayor etc. v. Pattison*, 10 East, 130, 135. If the covenant be to erect or set up a new house, a new wall, or a new fence, and the like, it will not bind the assignees unless they are named in the covenant: *Tallman v. Coffin*, 4 N. Y. 134; *Spencer's Case*, 5 Coke, 16a; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175. So, a lessor's covenant in the lease of a storeroom, "to put in counters and shelving," is something to be done in the future, and, as the covenant relates to a thing not in esse, at the time of the execution of the lease, it does not bind assigns where they are not expressly named in the covenant: *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282. Upon a covenant which runs with the land an action lies for or against the assignee at common law, though he is not named in the covenant. But it is otherwise if the covenant concerns something not in esse at the time, but to be built after the demise is made. If a lessee covenants for himself and his assigns to make a new wall upon a part of the thing demised, the assignee is bound. But if the thing to be done is collateral to the land, and does not touch or concern the thing demised, then the assignee is not charged, though named in the covenant. The covenant is merely personal, and does not affect the land demised: *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247. If a lessor covenants with a lessee, without mentioning his assigns, to pay the value of machinery and fixtures at the end of the term, which

machinery and fixtures are authorized to be substituted for those upon the premises at the time of the demise, such covenant inures to the benefit of the assignee of the tenant, though he is not expressly named in the lease: *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247.

Covenants which are connected with the estate run with the land, and vest in point of benefit and liability in an assignee: *Hickey v. Lake Shore etc. Ry. Co.*, 51 Ohio St. 40, 46 Am. St. Rep. 545, 36 N. E. 672. Covenants in a deed run with the land, and a grantee may sue a remote grantor for a breach of such covenants: *Beasley v. Phillips*, 20 Ind. App. 182, 50 N. E. 488. Covenants in a deed protect the grantee against every adverse right, interest, or dominion over the land, whether he had notice of such adverse interest or not: *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432, 20 N. E. 581. The presence of tenure is not necessary to enable covenants, either as to their benefits or their burdens, to run with land. Covenants of warranty, for quiet enjoyment, and against encumbrances, in conveyances in fee, are familiar examples of covenants running with the land, where no tenure exists: *Van Rensselaer v. Read*, 26 N. Y. 558, 575. When there is privity of estate between the covenanting parties in the land to which a covenant is annexed, and the covenant is, in terms, between the parties and their respective heirs and assigns, has direct and immediate reference to the land, relates to the mode of occupying and enjoying the land, is beneficial to the owner as owner, and to no other person, and is, in truth, inherent in and attached to the land, it necessarily goes with the land into the hands of the heir or assignee: *Savage v. Mason*, 3 Cush. 500, 505. All covenants which relate to land and are for its benefit run with it, and may be enforced by each successive assignee into whose hands it may run by conveyance or assignment, and the doctrine that covenants run with incorporeal as well as corporeal hereditaments seems to be supported by the weight of authority: *Louisville etc. R. R. Co. v. Illinois Cent. R. R. Co.*, 174 Ill. 448, 51 N. E. 824; *Gilmer v. Mobile etc. Ry. Co.*, 79 Ala. 569, 58 Am. Rep. 623. An apportionment of covenants which run with the land was permitted at common law: *Van Rensselaer v. Bradley*, 3 Denio, 135, 45 Am. Dec. 451. The grantee in a deed of conveyance cannot claim the benefit of any covenants in the deeds to those from whom he takes except those which run with the land, such as covenants for quiet enjoyment and warranty, etc.: *Barry v. Guild*, 126 Ill. 439, 18 N. E. 759. Under the laws of Georgia, a covenant of warranty of title, of quiet enjoyment, and of freedom from encumbrances, made by any grantor, passes with the land to subsequent purchasers, unless the covenant expressly negatives such transmission: *Tucker v. McArthur*, 103 Ga. 409, 30 S. E. 283. A statute declaring that covenants of warranty, for quiet enjoyment, for further assurance,

for the payment of rent, and for the payment of taxes and assessments, shall run with the land in all grants of real property, does not confine covenants which run with the land to those specifically named, and covenants which have for generations been held as covenants running with the land are not excluded by such enumeration: *Northern Pac. Ry. Co. v. McClure*, 9 N. Dak. 73, 81 N. W. 52. He in whose time a covenant running with the land is broken, whether the grantee or one who claims and holds under him, is the proper person to bring an action for a breach thereof: *Smith v. Perry*, 26 Vt. 279, 293.

The primary rule for the interpretation of a covenant contained in a deed is to gather the intention of the parties from their words, by reading, not simply a single clause, but the entire context, and where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met: *Clark v. Devoe*, 124 N. Y. 120, 21 Am. St. Rep. 652, 26 N. E. 275. So, in equity the test by which to determine whether a covenant in a deed runs with the land is the intention of the parties. To ascertain the intention, resort must be had to the words of the covenant read in the light of the surroundings of the parties and the subject of the grant: *Landell v. Hamilton*, 175 Pa. St. 327, 333, 34 Atl. 663. A covenant not of a nature permitted by law to run with land cannot be made to so run by agreement of the parties: *Masury v. Southworth*, 9 Ohio St. 340, 348; *Glenn v. Canby*, 24 Md. 127; *Wilmurt v. McGrane*, 45 N. Y. Supp. 32; 16 App. Div. 412. On the contrary, if the nature and character of the covenant are such that it may run with the land, it will not be annexed against the agreement of the parties: *Masury v. Southworth*, 9 Ohio St. 340, 348. Unless the agreement has some element of a covenant which runs with the land, it cannot be enforced at law, and a future grantee will hold the land free of it: *Bragdon v. Blaisdell*, 91 Me. 326, 39 Atl. 1036. But if the owner of land agrees to take water for a definite period for the purpose of irrigating such land, and to pay therefor a specified price annually, and the agreement declares that it shall run with and bind the land, a subsequent grantee of the land, with notice of the agreement, is not personally bound by it, but it creates a lien on such land which may be enforced against it in the hands of any subsequent purchaser with notice thereof: *Fresno Canal Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53. Covenants which run with the land pass with the title, whether that be transferred by assignment from the grantor or by act of law: *Carter v. Denman*, 23 N. J. L. 260.

A covenant is personal when it does not extend to, or affect the quality, value, or mode of enjoying the land conveyed, and is merely collateral to it, or is of such a character that a performance of it will defeat the estate of the party claiming the performance.

It does not, therefore, run with the land: *Glenn v. Canby*, 24 Md. 127. All covenants that are not prospective, and that do not pass with the land, are strictly personal covenants: *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338. A covenant is personal when it has no relation to the land conveyed: *Howard Mfg. Co. v. Water Lot Co.*, 53 Ga. 689; *Wells v. Benton*, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601; or is not connected with the title: *Harsha v. Reid*, 45 N. Y. 415; but all covenants concerning lands are not real covenants: *Miller v. Noonan*, 12 Mo. App. 370, 83 Mo. 343; *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611. Among those adjudged to be personal, and not, therefore, to run with the land, are covenants made by the owners of land between whom and the covenantee there is no privity of title or estate; a covenant not to hire persons of a certain description to work in a mill; a covenant by the lessee of a house to pay so much for every tun of wine sold in the house; or to buy all beer used by him from his lessors or from his successors in trade: See authorities cited in *Gilmer v. Mobile etc. Ry. Co.*, 79 Ala. 569, 58 Am. Rep. 623. So a covenant by a land owner not to permit a grist-mill to be erected thereon cannot charge an unnamed assignee: *Harsha v. Reid*, 45 N. Y. 415; for "no modern case decides that a stranger's covenants may run with the land": *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611. The covenant of a stranger to the title, it appearing from the deed that he did not claim the property which he purports to convey, is personal to the covenantee, and incapable of transmission by his mere conveyance of the land: *Mygatt v. Coe*, 152 N. Y. 457, 57 Am. St. Rep. 521, 46 N. E. 949. A covenant by the vendor of lands not to permit marl to be sold from adjoining lands is only a personal covenant and does not run with the land: *Brewer v. Marshall*, 18 N. J. Eq. 337. So with a covenant in a mortgage to pay the mortgage debt: *Glenn v. Canby*, 24 Md. 127; or a covenant to pay for land in a particular way, as by paying off certain judgments against the grantor, which are not liens: *Wells v. Benton*, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601; or a covenant whereby a mortgagee agrees not to foreclose within a year and the mortgagor agrees to "sell to any purchaser and at any price" that the mortgagee may direct: *Miller v. Noonan*, 83 Mo. 343; or a covenant for the benefit of the owners of a ferry, which is a totally separate and distinct property from two parcels of land in which an easement has been granted by the ferry company: *Wiggins Ferry Co. v. Ohio etc. Ry. Co.*, 94 Ill. 83; or a covenant in a lease of a lot in a town by the owner of the latter that the lessee shall have the exclusive right to keep a store in the town for a period of ten years: *Taylor v. Owen*, 2 Blackf. 801, 20 Am. Dec. 115; or a covenant between tenants in common to bear equally the expenses of any suit by or against the parties to the contract involving the validity of the title to their lands: *Chambers v. Wright*, 40 Mo. 482, 93 Am. Dec. 311; or a covenant in a deed that the tract conveyed, or that the grant un-

der which it is held, includes a specific quantity of land: *Salmon v. Vallejo*, 41 Cal. 481; or a covenant by the lessee, in a lease of ground with liberty to make a watercourse and to erect a mill, that he will not hire persons to work in the mill who are settled in other parishes: *Congleton v. Pattison*, 10 East, 180; or a covenant by an iron company to make the terminus of its road on certain land its only terminus in that region, and not to extend its present terminus any farther: *Lynn v. Mount Savage Iron Co.*, 34 Md. 603, 627; or a covenant by a grantee to pay and deliver the one-sixth part of all the oil produced or pumped from certain premises during the remainder of terms granted in leases thereof: *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604, 9 N. E. 845.

A personal covenant does not bind the assignee of the covenantor: *Lynn v. Mount Savage Iron Co.*, 34 Md. 603, 635; *Congleton v. Pattison*, 10 East, 130; *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611; *Glenn v. Canby*, 24 Md. 127; *Wells v. Benton*, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601; *Taylor v. Owen*, 2 Blackf. 301, 20 Am. Dec. 115. A covenant extinguished does not run with the land: *Buren v. Hubbell*, 54 Mo. App. 617; nor does a covenant broken at the time of conveyance: *Chapman v. Kimball*, 7 Neb. 399; *Davidson v. Cox*, 10 Neb. 150, 4 N. W. 1035; *Ballard v. Child*, 34 Me. 355; *Whitney v. Dinsmore*, 6 Cush. 128; *M'Carty v. Leggett*, 3 Hill, 134; *Swasey v. Brooks*, 30 Vt. 692; or a covenant implied in a deed of grant: *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542. A covenant does not run with land unless contained in a grant thereof, or of some estate therein: *Fresno Canal Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; and it does not run with the land unless it runs with it at law: *Middleton v. Newport Hospital*, 16 R. L. 319, 330, 15 Atl. 800.

Covenants as to Buildings, Improvements, etc.—The cases illustrating when covenants run with the land are as various as the particular covenants upon which they are based, and, in the future, each particular case must be determined, according to its own peculiar circumstances, by the application of common-law principles, or by statutes, if any exist. But among the multiplicity of cases on the subject, there are some which may be grouped as to subject matter. Among these are cases concerning buildings and other improvements. A covenant to erect buildings of a certain kind on lots, and to use them only for a specified purpose, runs with the land: *St. Andrew's etc. Appeal*, 67 Pa. St. 512. So with a covenant to erect a smelting-mill: *Sampson v. Easterby*, 4 Man. & R. 422; or a covenant that all buildings erected shall be set back a certain distance from the street: *Muzzarelli v. Hulshizer*, 163 Pa. St. 643, 30 Atl. 291; *Winfield v. Hemming*, 21 N. J. Eq. 188; *Zipp v. Barker*, 40 N. Y. Supp. 325; 6 App. Div. 609; and see *Roberts v. Levy*, 3 Abb. Pr., N. S., 311, showing that equity will enforce such a covenant. A covenant in a lease to pull down chimneys, and to put up new ones runs with the land: *Harris v. Goslin*, 3 Harr.

(Del.) 338; also a covenant by owners in common of land below the sea level that, on its division, the walls and guts of the lands thereby divided shall be borne by the owners thereof, and be payable out of the lands by an acre scot: *Morland v. Cook*, L. R. 6 Eq. 252. Covenants not to build upon adjoining land, or to leave it open, are real covenants running with the land: *Trustees of Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Brew v. Van Deman*, 6 Heisk. 433; *McLean v. McKay*, L. R. 5 P. O. 327. So, with a covenant that a street shall be opened, for a given width, to give access to the lot conveyed: *Thomas v. Poole*, 7 Gray, 83; or a covenant not to erect a building on the grantor's land in front of the tract conveyed: *Trustees of Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; and see *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218; or a covenant not to let or establish any other site on the same stream to be used for sawing mahogany: *Norman v. Wells*, 17 Wend. 136; or a covenant not to allow or permit a warehouse or place for shipping or receiving goods upon the conveyed premises, where the land is situated on a navigable river: *Robbins v. Webb*, 68 Ala. 393; or a covenant by a railroad company to build its track above the overflow of a river: *St. Louis etc. Ry. v. O'Baugh*, 49 Ark. 418, 5 S. W. 711. So, with a covenant by a railway company to erect improvements on land in consideration of a conveyance thereof: *Dorsey v. St. Louis etc. R. R. Co.*, 58 Ill. 65.

A lessor's covenant to pay for improvements made by the lessee runs with the land, according to some of the authorities: *Hunt v. Danforth*, 2 Curt. 592, Fed. Cas. No. 6887; *Ecke v. Fetzer*, 65 Wis. 55, 26 N. W. 266; *Lametti v. Anderson*, 6 Cow. 302; *Mansel v. Norton*, 22 Ch. Div. 769; *Stockett v. Howard*, 84 Md. 121; but according to others, such a covenant does not run with the land, and the lessor's liability upon it is purely personal: *Gardner v. Samuels*, 116 Cal. 84, 58 Am. St. Rep. 135, 47 Pac. 935; *Cicalla v. Miller*, 105 Tenn. 255, 58 S. W. 210; *Bream v. Dickerson*, 2 Humph. 126; and *Gray v. Cuthbertson*, 2 Chit. 482, holding that a covenant by the lessor that an appraisement of all the fruit trees and bushes planted and set by the lessee should be made and the lessor would pay for them, did not run with the land, on the ground that it concerned a thing not in esse at the time of the demise. Neither does a covenant for improvements run with the land where it relates merely to chattels: *Gorton v. Gregory*, 3 Best & S. 90. A covenant by a lessee that he will build a brick wall upon a part of the land demised does not bind his assignees: *Spencer's Case*, 5 Coke, 16a, the leading case upon the subject of covenants running with the land. In this case the court said that "the covenant concerns a thing which was not in esse at the time of the demise, but to be newly built after, and therefore shall bind the covenantor, his executors, or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being."

After land is conveyed to a grantee, his covenant to lay out and build certain passageways does not run with the land: *Smith v. Kelley*, 56 Me. 64, 69; and an agreement between the owner of a tenement-house and a board of health that no building on other lots owned by him shall be erected within two feet of such house is not a covenant which runs with the land, where the board has no interest in the premises: *Wilmurt v. McGrane*, 45 N. Y. Supp. 82; 16 App. Div. 412. If a railroad company, in consideration of a grant of certain privileges on the premises of a land owner, agrees not to extend its terminus beyond a certain point on the latter's land, such agreement is not a covenant running with the land: *Lypn v. Mount Savage Iron Co.*, 34 Md. 603. A builder's agreement that houses shall be "built ten feet back from the line of the street" is personal, and does not run with the land where it contains no covenant that thereafter houses shall not be built on the ground in a different manner: *Hutchison v. Thomas*, 190 Pa. St. 242, 42 Atl. 681; and a covenant to erect buildings not in existence has been held not to so run: *Thompson v. Rose*, 8 Cow. 266.

Covenants as to Dams, Flumes, and Levees.—Covenants to keep up and maintain dams to a certain height and in repair, and all necessary piers, races, bulkheads, and gates, so as to enable the grantee to enjoy the water granted, run with the land: *Fitch v. Johnson*, 104 Ill. 111; *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230; *Nye v. Hoyle*, 120 N. Y. 195, 24 N. E. 1. A covenant to share in the expense of repairing and keeping up a dam also runs: *Denman v. Prince*, 40 Barb. 216. Under a deed conveying certain premises, "together with the mill and all privileges and easements thereto belonging," the right to maintain a dam is part of the property conveyed. It must, therefore, be assumed that there is a covenant that the grantors had a right to maintain the dam at the height it was at the time the deed was made, and this covenant runs with the land: *Scott v. Stetler*, 128 Ind. 385, 27 N. E. 721. But where the owners of a mill site and water privilege convey a portion thereof, and six days afterward such owners and grantees enter into an agreement to erect and keep in repair, at their joint expense, a dam and flume for conducting water to their respective mills, but the disconnected matters are not shown to form one transaction, the contract of the grantees to contribute toward keeping the dam and flume in repair is not a covenant running with the mill site: *Wheeler v. Schad*, 7 Nev. 204. Where a levee in controversy was built by a land owner upon his own land at his own expense, and was to be wholly maintained by him, his contract to repair the levee did not create a covenant running with the land. It created a mere personal obligation on his part for a breach of which he was personally liable: *Indianapolis Water Co. v. Nulte*, 126 Ind. 373, 26 N. E. 72.

Covenants as to Depots, Stations, etc.—A covenant by a railroad corporation, in consideration of a grant of the right of way

through the plaintiff's lands, fifty feet wide on each side of the track, to erect a flag station at a point convenient to his house, to permit him to cultivate all the land embraced in the grant which was not needed for use by the railroad company, and if a depot was built, not to permit the sale of ardent spirits on the premises, runs with the land, and is binding on an assignee with notice: *Gilmer v. Mobile etc. Ry. Co.*, 79 Ala. 569, 58 Am. Rep. 623; *Mobile etc. Ry. Co. v. Gilmer*, 85 Ala. 422, 5 South. 138. A covenant by a railway company to locate and give to its grantor a depot and station on the land conveyed, for the benefit of the grantor and his assigns, and to be used for the general purposes of the company is one which runs with the land: *Georgia Southern R. R. v. Reeves*, 64 Ga. 492. In California a covenant to continue to operate a railway was held, in *Lyford v. North Pac. Coast R. R. Co.*, 92 Cal. 93, 28 Pac. 103, to be one not running with the land, where it was not for the direct benefit of the property or estate granted, as required by the Civil Code.

Covenants as to Easements and Servitudes—Burdens and Benefits.—Covenants creating easements may run with the land: *Norfleet v. Cromwell*, 64 N. C. 1; *Brewer v. Marshall*, 18 N. J. Eq. 337; *Campbell v. McCoy*, 31 Pa. St. 263; *Scott v. Stetler*, 128 Ind. 385, 27 N. E. 721; *Trustees of Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Avery v. New York Cent. etc. R. R. Co.*, 106 N. Y. 142, 12 N. E. 619; *Child v. Chappell*, 9 N. Y. 246, 255. A covenant runs with the land when either its burdens or its benefits pass to the assignee of the land: *First Nat. Bank v. Security Bank*, 61 Minn. 25, 63 N. W. 264. A covenant which confers an immediate, permanent, and beneficial effect on the use to which real estate is designed to be applied, runs with the land: *Condert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190; *National Union Bank v. Segur*, 39 N. J. L. 173. A covenant to render one-eighth of all mineral raised on certain land, in consideration of draining it runs with the land: *Crawford v. Witherbee*, 77 Wis. 419, 46 N. W. 545. So with a covenant by a vendor of a certain lot and banking-house to abandon, abstain from, and not to engage in, the business of banking in the locality for a stated time: *National Union Bank v. Segur*, 39 N. J. L. 173, 183; or a covenant that the land conveyed shall not thereafter be used or occupied at any time for the erection or maintenance of any slaughter-house, as it puts a burden on the land conveyed for the benefit of the land retained: *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190. An allowance, privilege, or grant of space in front of riparian premises, as an inducement to purchase lots also runs with the land: *Delogny v. Mercer*, 43 La. Ann. 205, 8 South. 903.

But it has been held that a covenant to divide oil produced from certain premises does not bind the grantees of the covenantor, where the latter did not make any attempt, in express terms, to bind his assigns: *Newburg Petroleum Co. v. Weare*, 44 Ohio St.

604, 9 N. E. 845; that a land owner's agreement that the products of a stone quarry shall be transported to market exclusively over one line of railroad is not a covenant real and does not, therefore, run with the land: *Kettle River R. R. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469; and that a permit by a town to enter and connect with a drain does not run with the land, where the permit is not in writing: *Estes v. Inhabitants of China*, 56 Me. 407. A successor to a grantee in a deed to a railway company for a right of way, containing a covenant to furnish the grantor with an annual pass, coupled with a condition that a failure to do so shall work a forfeiture of the land, takes subject to such condition: *Ruddick v. St. Louis etc. Ry. Co.*, 116 Mo. 25, 38 Am. St. Rep. 570, 22 S. W. 499; but a covenant to furnish a man and his family perpetual passes over the line of a railroad does not run with the land, because it is foreign to, and not connected with it: *Dickey v. Kansas City etc. Ry. Co.*, 122 Mo. 223, 26 S. W. 685. The burden of a covenant charging land, made by the owner with an entire stranger to the land so charged, will never run with the land, or rest upon the parties taking the land by assignment. To charge the land with the burden of any covenant, there must be some privity of estate between the covenantor and the assignee of the land so burdened: *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527.

There is, of course, a distinction between a servitude or easement imposed on land and a covenant real running with the land; but, "if the owner of land enters into a covenant concerning the land, concerning its use, subjecting it to easements or personal servitudes and the like, and the land is afterward conveyed and sold to one who has actual or constructive notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever, with respect to this liability in equity, whether the covenant is or is not one which in law 'runs with the land'": *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190; *Maryland Coal Co. v. Cumberland etc. R. R. Co.*, 41 Md. 843; *Kettle River R. R. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469; *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556; *Trustees etc. v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *McMahon v. Williams*, 79 Ala. 288; *Brown v. O'Brien*, 168 Mass. 484, 47 N. E. 195. Thus, equity will enforce covenants respecting uniformity in the position of buildings, where such covenants are, in effect, reciprocal easements: *Wetmore v. Bruce*, 118 N. Y. 319, 23 N. E. 303.

Conditions as to Effecting Insurance.—A covenant to insure buildings, when the money, in case of loss, is to be used to rebuild, runs with the land: *Thomas v. Vonkapff*, 6 Gill & J. 372; *Masury*

v. Southworth, 9 Ohio St. 340; Vernon v. Smith, 5 Barn. & Ald. 1; Northern Trust Co. v. Snyder, 76 Fed. 34; In re Sands etc. Co., 3 Biss. 175, Fed. Cas. No. 12,307. But a mere covenant to keep buildings on mortgaged premises insured does not run with the land: Dunlop v. Avery, 89 N. Y. 592.

Covenants as to Encumbrances.—The great preponderance of authority establishes the proposition that covenants against encumbrances are broken immediately, if at all, are merely personal, and do not run with the land: Sayre v. Sheffield etc. Coal Co., 106 Ala. 440, 18 South. 101; Logan v. Moulder, 1 Ark. 813, 33 Am. Dec. 338; Brooks v. Moody, 25 Ark. 452; Lawrence v. Montgomery, 37 Cal. 183; Salmon v. Vallejo, 41 Cal. 481, 484; Mitchell v. Warner, 5 Conn. 497; Davis v. Lyman, 6 Conn. 249, 258; Butler v. Barnes, 60 Conn. 170, 21 Atl. 419; Redwine v. Brown, 10 Ga. 311; Heath v. Whidden, 24 Me. 383; Tufts v. Adams, 8 Pick. 547; Clark v. Swift, 8 Met. 390; Whitney v. Dinsmore, 6 Cush. 124; Blondeau v. Sheridan, 81 Mo. 545; Moore v. Merrill, 17 N. H. 75, 43 Am. Dec. 593; Morrison v. Underwood, 20 N. H. 369; Stewart v. Drake, 9 N. J. L. 139; Chapman v. Holmes, 10 N. J. L. 20; Garrison v. Sandford, 12 N. J. L. 261; Carter v. Denman, 23 N. J. L. 260; Wilson v. Cochran, 46 Pa. St. 229; Funk v. Vonelda, 11 Serg. & R. 110, 14 Am. Dec. 617; Swasey v. Brooks, 30 Vt. 692; Pillsbury v. Mitchell, 5 Wis. 17; Fuller v. Jillett, 2 Fed. 30; whether the covenant in the deed is express or one implied by law: Lawrence v. Montgomery, 37 Cal. 183. A covenant, whether express or implied, that land granted is free from encumbrances, does not run with the land, or pass to an assignee or succeeding grantee: McPike v. Heaton, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179.

But in some of the states such covenants run with the land: Dehority v. Wright, 101 Ind. 382; Martin v. Baker, 5 Blackf. 232; Security Bank v. Holmes, 68 Minn. 538, 71 N. W. 699; Stites v. Hobbs, 2 Disn. 571; Foote v. Burnet, 10 Ohio, 317, 36 Am. Dec. 90; Cole v. Kimball, 52 Vt. 639. A remote grantee may, in Iowa, recover for the amount paid to remove the encumbrance: Knadler v. Sharp, 36 Iowa, 232; and in Illinois a remote grantee may maintain an action in his own name against the original grantor, on a covenant in the latter's deed, "that said lands are free from all encumbrances," where the substantial breach of the covenant occurred after the assignment, and the whole actual damage was sustained by the assignee. While the covenant, in such a case, is nominally broken on the execution of the deed, the rule of the common law that choses in action are not assignable does not apply: Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1. In Indiana, a covenant against encumbrances, embraced in the statutory form of Indiana deeds of general warranty is one that runs with the land: Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260; Beasley v. Phillips, 20 Ind. App. 182, 50 N. E. 488. In Maine, a covenant against encumbrances may, by virtue of a statutory provision, pass to the

grantee's assignee, with a right, in his own name, to sue for a breach thereof: *Allen v. Little*, 36 Me. 170; but the statute leaves the common law in force as to covenants real which run with the land: *Forbes v. Hall*, 51 Me. 566. In Minnesota, a covenant against encumbrances which are a money charge on land runs with the land until they are discharged, and an action on such covenant can be maintained by an assignee of the covenantee. Hence, a covenant against encumbrances, although contained in a mortgage, which are a money charge on the land, runs with the land; and an action may be maintained for its breach by an assignee of the mortgagee who has acquired title to the land by purchase at a foreclosure sale and who has paid the encumbrances: *Security Bank v. Holmes*, 65 Minn. 531, 60 Am. St. Rep. 495, 68 N. W. 113; and see the same case, 68 Minn. 538, 71 N. W. 699. And in New York it has been held, under the code of that state, which makes choses in action assignable, that a covenant against encumbrances runs with the land: *Clarke v. Priest*, 42 N. Y. Supp. 766; 18 Misc. Rep. 501; *Ernst v. Parsons*, 54 How. Pr. 163; *Boyd v. Belmont*, 58 How. Pr. 513. "It is irrational," said Gaynor, J., in *Clarke v. Priest*, 42 N. Y. Supp. 766, 18 Misc. Rep. 501, "to stand by a common-law rule when the reason and foundation of it have been removed by legislation or by changed conditions. Nearly all of the incongruities in modern jurisprudence are the result of doing so."

Without going into details, it may be stated as a general rule that an encumbrance is anything which burdens the title: *Post v. Campau*, 42 Mich. 90, 3 N. W. 272; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290. An encumbrance is any right to or interest in land which may subsist in third persons, to the diminution of the value of the land, and not inconsistent with the passing of the fee in it by deed: *Burr v. Lamaster*, 30 Neb. 688, 27 Am. St. Rep. 428, 46 N. W. 1015; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246. A covenant in a deed against encumbrances covers those unknown as well as those known to the grantee at the time of his purchase: *Burr v. Lamaster*, 30 Neb. 688, 27 Am. St. Rep. 428, 46 N. W. 1015.

Covenants as to Fencing.—A covenant to erect and maintain a good and sufficient fence runs with the land: *Blain v. Taylor*, 19 Abb. Pr. 228; *Hickey v. Lake Shore etc. Ry. Co.*, 51 Ohio St. 40, 46 Am. St. Rep. 545, 36 N. E. 672; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 24 N. E. 756; *Moxley v. New Jersey etc. R. R. Co.*, 66 Hun, 632; 21 N. Y. Supp. 347; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550. Thus, a covenant by a railroad company to fence along its line of road, over another's land, or to fence its right of way, is a covenant running with the land: *Moxley v. New Jersey etc. R. R. Co.*, 66 Hun, 632; 21 N. Y. Supp. 347; *Lake Erie etc. Ry. Co. v. Griffin*, 25 Ind. App. 138, 53 N. E. 1042, 57 S. E. 722; *Lake Erie etc. Ry. Co. v. Power*, 15 Ind. App. 179, 43 N. E. 959; so with a covenant by a railway company, in a deed to it, to put in and maintain a farm crossing and cattle guards:

Lake Erie etc. Ry. Co. v. Priest, 131 Ind. 413, 31 N. E. 77; Toledo etc. R. R. Co. v. Burgan, 9 Ind. App. 604, 37 N. E. 81; Toledo etc. R. R. Co. v. Cosand, 6 Ind. App. 222, 33 N. E. 251; and so, with a grantor's covenant to fence land along the line of a railway or a railroad's right of way: Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Duffy v. New York etc. R. R. Co., 2 Hilt. 496; Easter v. Little Miami R. R. Co., 14 Ohio St. 48; Blain v. Taylor, 19 Abb. Pr. 228. A covenant by the grantor in a deed to maintain a fence or wall between the granted premises and the grantor's premises runs with the land: Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254; and a covenant that the grantee shall keep and maintain a partition fence between the lands conveyed and those of the grantor runs with the land: Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550; Dey v. Prentiss, 90 Hun, 27, 35 N. Y. Supp. 563; Countryman v. Deck, 13 Abb. N. C. 110. In Wisconsin, a distinction is made between a covenant to maintain a fence already in existence and one "to build" and maintain a fence. The former is held to run with the land, while the latter is personal only: Hartung v. Witte, 59 Wis. 283, 18 N. W. 175. An agreement in a deed conveying a right of way for a railroad, to fence the same, is a covenant running with the land and essentially inhering in it, and such covenant binds the grantee of the original covenantor, and inures to the benefit of the owner of the servient estate in which the easement with its encumbrances inheres: Midland Ry. Co. v. Fisher, 125 Ind. 19, 21 Am. St. Rep. 189, 24 N. E. 756. In the condemnation of land for a railroad, the cost of fences is properly considered in the assessment of damages and when they have been paid by the railroad company the obligation to fence becomes a covenant running with the land: St. Louis etc. R. R. Co. v. Mitchell, 47 Ill. 165.

But the authorities are not uniform as to whether a covenant to fence runs with the land. Thus, it has been held that a covenant in a deed to a railroad company agreeing to build a fence along the railroad, omitting the word "assigns," is personal to the grantors, and does not run with the land nor bind tenants or other successors in interest: Brown v. Southern Pac. Co., 36 Or. 128, 78 Am. St. Rep. 761, 58 Pac. 1104. For other cases showing when no covenant as to fencing runs with the land, see Cook v. Milwaukee etc. Ry. Co., 36 Wis. 45; Boston etc. R. R. Co. v. Briggs, 132 Mass. 24; Gulf etc. Ry. Co. v. Smith, 72 Tex. 122, 9 S. W. 865; Wright v. Wright, 21 Conn. 329. A parol promise to maintain a fence does not run with the land: Guilfoos v. New York Cent. R. R. Co., 69 Hun, 593; 28 N. Y. Supp. 925. Where parties at the time of conveyances contemplated subdividing the land into town lots, and this was afterward done, a covenant by the grantee to perpetually maintain a fence between the land granted and the other lands of the grantor does not run with the lots not abutting on the line of the proposed fence: Walsh v. Barton, 24 Ohio St. 28. So an agreement by a

grantee in a deed poll, for himself, his heirs and assigns, to make and maintain a fence between the granted premises and the grantor's adjoining land, is merely a personal obligation, not amounting to a covenant, or a charge upon the land. It is merely an obligation, which, if enforceable at all against purchasers, is to be enforced against them by a court of equity alone: *Kennedy v. Owen*, 138 Mass. 199, 203.

Covenants as to Nuisances—Particular Businesses.—A stipulation in a deed that the grantee will not erect a building or carry on a particular business which shall cause or become a nuisance to owners of contiguous land is a covenant running with the land: *Clement v. Burtis*, 121 N. Y. 708, 24 N. E. 1013; *Atlantic Dock Co. v. Leavitt*, 50 Barb. 135; and courts of equity may enforce such stipulations whether they run with the land or not: *Barron v. Richard*, 8 Edw. Ch. 96; *Birdsall v. Tiemann*, 12 How. Pr. 551. But it is only by the use of plain and direct language of a grantor that it can be held that he has created a right in the nature of an easement in land and attached it to one parcel as the dominant estate, and made the other servient thereto for all time to come. The creation of such a right will not be inferred by a forced construction of a covenant, nor by any amplification of its language beyond its natural meaning. Where, therefore, the owner of two adjoining city lots conveys one of them by a deed in which he covenants, for himself, his heirs, executors, administrators, and assigns, to and with the grantee, his heirs, executors, administrators, and assigns, that he will not erect or cause to be erected on said lot any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance, this covenant, the restriction against building being confined to the grantor himself and not imposing any obligation in that regard upon any other person, must be regarded as personal to the grantor, and solely against his own acts, and will not make him liable for the acts of his grantees or of subsequent owners, provided, he neither does such acts himself nor causes them to be done: *Clark v. Devoe*, 124 N. Y. 120, 21 Am. St. Rep. 652, 26 N. E. 275. That a covenant not to carry on any particular business upon granted premises does not run with the land, see *Brewer v. Marshall*, 18 N. J. Eq. 337, 345.

Covenants as to Payment of Mortgage Debts.—A promise by a grantee to pay a mortgage to which the land is subject, made as part consideration for the land, binds the grantee: *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Sparkman v. Gove*, 44 N. J. L. 252. That a covenant to pay a mortgage debt does not run with the land, see *Glenn v. Canby*, 24 Md. 127; contra, and that it is also enforceable in equity, see *Wilcox v. Campbell*, 35 Hun, 254.

Covenants as to Party-walls.—In some of the states a covenant to share in the expense of building a party-wall, when the same shall be used by the covenantor, is held to run with the land: *Kimm v.*

Griffin, 67 Minn. 25, 64 Am. St. Rep. 385, 69 N. W. 634; Burr v. Lamaster, 30 Neb. 688, 27 Am. St. Rep. 428, 46 N. W. 1015; Richardson v. Toby, 121 Mass. 457, 23 Am. Rep. 283; Conduitt v. Ross, 102 Ind. 166, 28 N. E. 198; King v. Wight, 155 Mass. 444, 29 N. E. 644; especially where the covenant contains an expressed intention of the parties that it shall so run: Mott v. Oppenheimer, 135 N. Y. 812, 31 N. E. 1097; Adams v. Noble, 120 Mich. 545, 79 N. W. 810.

Thus, contracts with reference to party-walls should be construed with a view to carry out the purpose and intent of the parties. Hence, if two adjoining owners enter into a contract by which one agrees to build a party-wall, and the other covenants to pay his proportion when he uses it, but it is agreed, for the mutual benefit of the parties, that in all deeds and transfers the wall shall be reserved as a partition wall, that it shall be kept in good condition and repair at the expense of both parties, each paying share and share alike, and that the wall and the conditions imposed are to be permanent, such contract is not merely a personal one between the parties, but benefits and burdens arise from such covenants, are inseparably connected therewith, and necessarily pass, according to the manifest intention of the parties, to a grantee of the land. Such covenants, therefore, run with the land and do not give a cause of action, upon a breach thereof, in favor of one of the owners who has parted with his interest in the land: Kimm v. Griffin, 67 Minn. 25, 64 Am. St. Rep. 385, 69 N. W. 634. A covenant by the owner of a lot to pay a portion of the cost of a party-wall erected thereon in the event that it is used by him is a covenant and encumbrance which runs with the land, and is binding upon his grantee. It therefore constitutes a breach of the covenants in his deed against encumbrances: Burr v. Lamaster, 30 Neb. 688, 27 Am. St. Rep. 428, 46 N. W. 1015. Such covenants are enforceable in equity, whether they run with the land or not: Sharp v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433; particularly where they contain a clear manifestation of an intent that they should so run, and bind the parties and their assignees: First Nat. Bank v. Security Bank, 61 Minn. 25, 63 N. W. 264.

The preponderance of authority, however, is to the effect that such covenants do not run with the land; that the grantees of the original parties cannot, by reason of their holding adjoining lots, take advantage of the benefit, or be subjected to the burden, of the covenant to pay for a proportional part of a party-wall; that the right of recovery is personal to the builder; that the obligation to pay, except in certain cases, rests upon the covenantor only; and that an agreement of the parties that the covenant shall be binding upon their heirs and assigns, or that it shall run with the land is ineffectual to make it do so: See the monographic note to Bloch v. Isham, 92 Am. Dec. 301, on the law of party-walls; Parsons v. Baltimore etc. Loan Assn., 44 W. Va. 335, 67 Am. St. Rep. 769, 29 S. E. 999; Gibson v. Holden, 115 Ill. 199, 56 Am. Rep. 146, 3 N. E.

282; Sebald v. Mulholland, 155 N. Y. 455, 50 N. E. 260; Hart v. Lyon, 90 N. Y. 663; Scott v. McMillan, 76 N. Y. 141; Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Bloch v. Isham, 28 Ind. 37, 92 Am. Dec. 287; McMullen v. Moffitt, 68 Ill. App. 160; Todd v. Stokes, 10 Pa. St. 155; Gilbert v. Drew, 10 Pa. St. 219; Bell v. Bronson, 17 Pa. St. 363. A covenant to share the expense of a party-wall, and a stipulation that it shall run with lot, create a lien, however, on the land, which is binding upon a subsequent purchaser, although he has not assumed the liability personally, and has no notice thereof, other than that the record of the deed affords: Parsons v. Baltimore etc. Loan Assn., 44 W. Va. 335, 67 Am. St. Rep. 769, 29 S. E. 999; and a court of equity may also enforce such a charge: First Nat. Bank v. Security Bank, 61 Minn. 25, 63 N. W. 264; Platt v. Eggleston, 20 Ohio St. 414, 419.

Covenants as to Rent.—As a general rule, the covenant to pay rent runs with the land: Stevenson v. Lambard, 2 East, 575; Van Rensselaer v. Smith, 27 Barb. 104; Van Rensselaer v. Dennison, 35 N. Y. 392, 400; Tyler v. Heldorn, 46 Barb. 452; whether it is made by a grantee, reserving rent to the grantor, or by a lessee for a term: Van Rensselaer v. Bonesteel, 24 Barb. 365. A covenant to pay rent "clear of all charges and assessments whatsoever" runs with the land: Sandwith v. De Silver, 1 Browne (Pa.), 221. In Hurst v. Rodney, 1 Wash. C. C. 375, Fed. Cas. No. 6937, it was held that a covenant to pay rent runs as long as the land is retained by the promisor. That a ground rent covenant runs with the land, see Quain's Appeal, 22 Pa. St. 510; Hurst v. Rodney, 1 Wash. C. C. 375, Fed. Cas. No. 6937; Barron v. Whiteside, 89 Md. 448, 43 Atl. 825. Contra, Crawford v. Chapman, 17 Ohio, 449; Miles v. Branch, 5 Maule & S. 411. And if a mortgagor and mortgagee make a lease in which the covenants for rents and repairs are only with the mortgagor and his assigns, it has been held that the assignee of the mortgagee cannot maintain an action for a breach of these covenants, as they are collateral to his grantor's interest in the land, and do not run with it: Webb v. Russell, 3 Term Rep. 393.

Covenants as to Repairs.—Covenants to repair, or to share in the expenses of repairs, runs with the land, whether made by a grantee, a lessee, or between contiguous owners; and the same is true of a covenant to deliver up the premises in repair: Wooliscroft v. Norton, 15 Wis. 198; Spencer's Case, 5 Coke, 16a; Thomas v. Vonkapff, 6 Gill & J. 372; Martyn v. Clue, 18 Q. B. 661; Minshull v. Oakes, 2 Hurl. & N. 793; Martyn v. Williams, 1 Hurl. & N. 817; Demarest v. Willard, 8 Cow. 206; Myers v. Burns, 33 Barb. 401; Pollard v. Shaffer, 1 Dall. 210, 1 Am. Dec. 239; Allen v. Culver, 3 Denio, 284; Denman v. Prince, 40 Barb. 216; Shelby v. Hearne, 6 Yerg. 511. A covenant to keep a bridge in repair runs with the land: Middlefield v. Church Mills etc. Co., 160 Mass. 267, 35 N. E. 780; so with a covenant to keep a division fence in repair: Dey v. Prentice, 90 Hun, 27; 35 N. Y. Supp. 563; or a cove-

nant to keep fences and crossings in repair: *Huston v. Cincinnati etc. R. R. Co.*, 21 Ohio St. 235; or a covenant to keep a dam in repair: *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230; *Denman v. Prince*, 40 Barb. 213; or a dam and raceway: *Wooliscroft v. Norton*, 15 Wis. 188; *Carr v. Lowry*, 27 Pa. St. 257; or a canal dug for the purpose of draining the lands of the parties to the covenant: *Norfleet v. Cobb*, 64 N. C. 1. But a covenant made six days after a deed, to share in the expense of keeping a dam and flume in repair, will not run with the land: *Wheeler v. Schad*, 7 Nev. 204; nor will a covenant by a landlord to do certain repairs, which are specified, so run after a breach: *Gerzebek v. Lord*, 33 N. J. L. 240; and an agreement by the grantee in a deed poll to keep in repair a building on adjoining land of the grantor is not a covenant: *Martin v. Drinan*, 128 Mass. 515. See the subdivision, *Covenants as to Dams and Levees*, *supra*.

Covenants as to the Use of Property frequently run with the land: *Brouwer v. Jones*, 23 Barb. 153; *St. Andrew's etc. Appeal*, 67 Pa. St. 512; *Morse v. Aldrich*, 19 Pick. 449; *Electric etc. Imp. Co. v. West Ridge Coal Co.*, 187 Pa. St. 500, 41 Atl. 458. Thus, it has been held that a covenant between adjacent owners, which restricts the use to which premises shall be put, runs with the land: *Trustees v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Brouwer v. Jones*, 23 Barb. 153; *St. Andrew's etc. Appeal*, 67 Pa. St. 512; and see *Post v. Well*, 115 N. Y. 361, 12 Am. St. Rep. 809, 22 N. E. 145; but see *Wilson v. Hart*, L. R. 1 Ch. App. 463. So, with a covenant not to let or establish any other site on the same stream to be used for sawing mahogany: *Norman v. Wells*, 17 Wend. 136; or a condition not to sell or dispose of any wood or timber off and from the demised premises without permission in writing from the landlord: *Verplanck v. Wright*, 23 Wend. 506, 511; or a covenant that the tenant will "remove all rubbish and spalls" at the expiration of the term: *Coppinger v. Armstrong*, 5 Ill. App. 637; or a covenant not to buy or sell on the demised premises, during the term, any foreign wines other than those supplied by the lessor: *White v. Southend Hotel Co.*, [1897] 1 Ch. 767; or a covenant, in a deed of land used as a summer resort, "that no intoxicating liquors of any kind shall ever be sold upon the above-described premises": *Spencer v. Stevens*, 41 N. Y. Supp. 39; 18 Misc. Rep. 112; or a covenant not to build upon a lane: *Dexter v. Beard*, 130 N. Y. 549, 29 N. E. 983; or a covenant to leave an estate stocked with game: *Hooper v. Clark*, 8 Best & S. 150; or a covenant that a lot shall revert: *Baker v. St. Louis*, 75 Mo. 671.

But a personal covenant as to the use of premises does not run with the land: *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676; *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527—cases illustrating what covenants are void as being in restraint of trade; *Harsha v. Reid*, 45 N. Y. 415. A cove-

ment not to trespass does not run with the land: *Hinckel v. Stevens*, 35 App. Div. 5; 54 N. Y. Supp. 457; nor a covenant restricting the height of buildings: *Krekeler v. Aulbach*, 51 App. Div. 591; 64 N. Y. Supp. 908; nor a restriction as to building, in the absence of evidence that it was imposed for the benefit of other land: *Skinner v. Shepard*, 130 Mass. 180. A covenant concerning the transportation of the product of a stone quarry, which has none of the elements of covenants running with the land does not run with it: *Kettle River R. R. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469; *Bragdon v. Blaisdell*, 91 Me. 326, 39 Atl. 1036.

Covenants which regulate or restrict the use of land may, however, be enforced in equity whether they technically run with the land or not, where the party acquiring title took with notice of them: *Wilson v. Hart*, L. R. 1 Ch. App. 463; *St. Andrew's etc. Appeal*, 67 Pa. St. 512; *Parker v. Whyte*, 1 Hem. & M. 167; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Barrow v. Richard*, 8 Paige, 351, 35 Am. Dec. 713; *Equitable Life etc. Soc. v. Brennan*, 148 N. Y. 661, 43 N. E. 173; *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Coudert v. Sayre*, 46 N. J. Eq. 388, 19 Atl. 190; *De Gray v. Monmouth etc. Co.*, 50 N. J. Eq. 329, 24 Atl. 388; *Kettle River R. R. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469; *Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Mann v. Stephens*, 15 Sim. 377; *Peabody Heights Co. v. Wilson*, 82 Md. 186, 32 Atl. 886, 1077; *American Strawboard Co. v. Haldeman Paper Co.*, 88 Fed. 619; and other authorities to the same point, cited near the beginning of this note, in discussing the general principles of the subject under consideration. When a deed which creates a right discloses a covenant which burdens the right, a subsequent grantee of the original covenantor, in accepting such deed and asserting a claim to the privileges conferred by it, becomes bound to perform the agreement. And when, in addition to the covenant in the deed, the facts open to observation show that the covenant has not been kept, such grantee cannot justly claim the rights of a purchaser without notice: *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 24 N. E. 756.

Covenants to Pay Taxes and Assessments run with the land, according to the weight of authority: *Sandwith v. De Silver*, 1 Browne (Pa.), 221; *Post v. Kearney*, 2 N. Y. 394, 51 Am. Dec. 303; *Astor v. Hoyt*, 5 Wend. 603; *Barron v. Whiteside*, 89 Md. 448, 43 Atl. 825; *West Virginia etc. R. R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696; contra, *Graber v. Duncan*, 79 Ind. 565. And an implied covenant in a grant that the land is free from taxes is personal and does not run with the land: *McPike v. Heaton*, 181 Cal. 109, ante, p. 335, 63 Pac. 179.

Covenants as to Waters and Ditches.—A covenant to supply or furnish water for use on premises runs with the land: *Jourdain v. Wilson*, 4 Barn. & Ald. 268; *Cooke v. Chilcott*, 8 Ch. Div. 694; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; or a covenant to supply a water power for any specified purpose: *Hottell v. Farmers' Protective Assn.*, 25 Colo. 67, 71 Am. St. Rep. 100, 53 Pac. 327; *Noonan v. Orton*, 4 Wis. 335; and see *Horn v. Miller*, 136 Pa. St. 640, 20 Atl. 706. So with a covenant to divide the waters of a stream: *Weill v. Baldwin*, 64 Cal. 476, 2 Pac. 249; or to maintain such a stage and volume of water in a lake that the quantity flowing in a creek upon which the covenantee owns land, embracing a water-mill privilege, shall not be injured by the diversion of water out of the lake from which the creek flows: *Shaber v. St. Paul Water Co.*, 80 Minn. 179, 14 N. W. 874. A provision made as part of the consideration for land that "the water . . . be made to run" in a certain place, will be construed to be a covenant attached to the land: *Peden v. Chicago etc. Ry. Co.*, 73 Iowa, 328, 5 Am. St. Rep. 680, 35 N. W. 424.

It has been held, however, that a conveyance of a privilege of drawing water from a pond is not a covenant running with the land: *Wheelock v. Thayer*, 16 Pick. 68; that an agreement to dig a new channel for a stream, and to construct certain levees, in consideration of a license, to change the course of the stream does not so run: *Junction R. R. Co. v. Sayers*, 28 Ind. 318. An agreement to take water from a water company, for a stated period and price, for the use of land, and that such covenant shall "run with and bind the land," creates a lien on the land for the water furnished for such use but it is not a covenant running with the land: *Fresno Canal etc. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; *Fresno Canal etc. Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275. In the absence of an express covenant that a grantor will continue the use of a ditch, or keep it in repair, he is not bound to repair it or keep it in a condition for continued use: *Bean v. Stoneman*, 104 Cal. 49, 37 Pac. 777, 38 Pac. 89. Compare the subdivision, *Covenants as to Dams and Levees*, *supra*.

Covenants Creating Charges.—Covenants which impose a charge upon land run with the land: *Wiggins Ferry Co. v. Ohio etc. Ry. Co.*, 94 Ill. 83; *Kentucky Cent. R. R. Co. v. Kenney*, 82 Ky. 154; *Howard etc. Co. v. Water Lot Co.*, 53 Ga. 689; *Dexter's Appeal*, 81 Pa. St. 403; *Goudy v. Goudy*, *Wright (Pa.)*, 410.

Covenants of Further Assurance run with the land: *Collier v. Gamble*, 10 Mo. 467; *Colby v. Osgood*, 29 Barb. 339; *Kenney v. Norton*, 10 Heisk. 384, 386; *Ernst v. Parsons*, 54 How. Pr. 163; *Bennett v. Waller*, 23 Ill. 97; *Clarke v. Priest*, 21 App. Div. 174; 47 N. Y. Supp. 489.

Covenants of Seisin and of Right to Convey.—The courts of several of the American states, following *Kingdon v. Nottle*, 1 Maule & S. 355, hold the covenant of title or of seisin to run with the land:

Martin v. Baker, 5 Blackf. 232; Coleman v. Lyman, 42 Ind. 289; Schofield v. Homestead Co., 32 Iowa, 317, 7 Am. Rep. 197; Boon v. McHenry, 55 Iowa, 202, 7 N. W. 503; Hall v. Scott County, 7 Fed. 841; Schnelle etc. Lumber Co. v. Barlow, 34 Fed. 853. In Missouri, the statutory covenant of indefeasible seisin, implied in the words "grant, bargain and sell," is a covenant running with the land: Dickson v. Desire, 23 Mo. 151, 66 Am. Dec. 661; Chambers v. Smith, 23 Mo. 174; Magwire v. Rigglin, 44 Mo. 512. It is a covenant of indemnity, continuing to successive grantees, and inuring to the one upon whom the loss falls: Magwire v. Rigglin, 44 Mo. 512; Allen v. Kennedy, 91 Mo. 324, 2 S. W. 142; Schnelle etc. Lumber Co. v. Barlow, 34 Fed. 853. The courts in Ohio hold the covenant of seisin to be real and to run with the land where the covenantor is in possession, but only a personal covenant where he is not in possession: Backus v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Devore v. Sunderland, 17 Ohio, 52, 49 Am. Dec. 442; Great Western Stock Co. v. Saas, 24 Ohio St. 542. In Maine, a covenant of seisin may, by virtue of the statute of that state, pass to the grantee's assignee, with a right, in his own name, to maintain suit for a breach of the covenant: Prescott v. Hobbs, 80 Me. 345; Ballard v. Child, 34 Me. 355; Allen v. Little, 36 Me. 170; Wilson v. Widenham, 51 Me. 568.

But the courts of a great majority of the states hold the covenant of seisin to be personal, and not to run with the land; and if there is a breach at all, that it is complete and entire at the date of the execution of the covenant: Sayre v. Sheffield etc. Coal Co. 106 Ala. 440, 18 South. 101; Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 838; Ross v. Turner, 7 Ark. 132, 44 Am. Dec. 531; Salmon v. Vallejo, 41 Cal. 481; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169; Mitchell v. Warner, 5 Conn. 498; Butler v. Barnes, 60 Conn. 170, 192, 21 Atl. 419; Redwine v. Brown, 10 Ga. 311; Brady v. Spurck, 27 Ill. 478; King v. Gilson, 32 Ill. 348, 83 Am. Dec. 269; Tone v. Wilson, 81 Ill. 529; Bethell v. Bethell, 54 Ind. 428, 23 Am. Rep. 650; Craig v. Donovan, 63 Ind. 513; Dale v. Shively, 8 Kan. 276; Fitzhugh v. Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139; Slater v. Rawson, 1 Met. 450; Bartholomew v. Candee, 14 Pick. 167; Kimball v. Bryant, 25 Minn. 496; Tapley v. Labeaum, 1 Mo. 550; Real v. Hollister, 20 Neb. 112, 29 N. W. 189; Moore v. Merrill, 17 N. H. 75, 43 Am. Dec. 593; Morrison v. Underwood, 20 N. H. 369; Lot v. Thomas, 2 N. J. L. 407, 2 Am. Dec. 354; Chapman v. Holmes, 10 N. J. L. 20; Carter v. Denman, 23 N. J. L. 260; Bingham v. Weiderwax, 1 N. Y. 509; Mygatt v. Coe, 124 N. Y. 212, 26 N. E. 611; M'Carty v. Leggett, 3 Hill, 134; Fowler v. Poling, 2 Barb. 300; Dusenbury v. Callaghan, 8 Hun, 541, 543; Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Hamilton v. Wilson, 4 Johns. 72, 4 Am. Dec. 253; Bowne v. Wolcott, 1 N. Dak. 497, 48 N. W. 426; Wilson v. Cochran, 46 Pa. St. 229; Seitzinger v. Weaver, 1 Rawle, 377; Garfield v. Williams, 2 Vt. 327; Catlin v. Hurlburt, 3 Vt. 403; Pierce v. Johnson, 4 Vt. 247; Richardson v. Dorr, 5 Vt. 9; Swasey v. Brooks,

80 Vt. 692. If a husband joining in a conveyance with his wife of her separate property covenants that she has a good title, and the deed also contains covenants of general warranty, such covenants on the part of the husband are personal, and do not pass to a subsequent grantee of the land: *Mygatt v. Coe*, 152 N. Y. 457, 57 Am. St. Rep. 521, 46 N. E. 949. Compare *Mygatt v. Coe*, 147 N. Y. 456, 42 N. E. 17; 142 N. Y. 78, 36 N. E. 870; 124 N. Y. 212, 26 N. E. 611.

Covenants of the right to convey are broken immediately on the execution of the deed, if at all; consequently, such covenants are merely personal, and do not run with the land: *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Sayre v. Sheffield etc. Coal Co.*, 106 Ala. 440, 18 South. 101; *Ross v. Turner*, 7 Ark. 132, 44 Am. Dec. 531; *Salmon v. Vallejo*, 41 Cal. 481; *Redwine v. Brown*, 10 Ga. 311; *Brady v. Spurck*, 27 Ill. 478; *King v. Gilson*, 82 Ill. 348, 83 Am. Dec. 269; *Tone v. Wilson*, 81 Ill. 529; *Scantlin v. Allison*, 12 Kan. 85; *Bickford v. Page*, 2 Mass. 455; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Chapman v. Holmes*, 10 N. J. L. 20; *Carter v. Denman*, 23 N. J. L. 260; *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611; *Fowler v. Poling*, 2 Barb. 300; *Richardson v. Dorr*, 5 Vt. 9. But in Maine and Missouri, a covenant of the right to convey runs with the land, or, at least, inures, by virtue of the statute, to the benefit of a subsequent transferee: *Prescott v. Hobbs*, 30 Me. 345; *Hall v. Scott County*, 7 Fed. 841; *Dickson v. Desire*, 23 Mo. 151, 66 Am. Dec. 661. The covenants of seisin and of power to convey "are synonymous, but not converse." They are of the same nature when the power to sell results from seisin, and if one is personal the other is personal: *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442. If a husband joins with his wife in a conveyance of her separate estate, and covenants that she has good right to convey the premises, and the deed also contains the usual covenants of warranty and for quiet enjoyment, such covenants, as against the wife, pass with the land, because she has possession of it, and delivers such possession to her grantee, but as the husband had no possession in his own right, and therefore delivered none to the grantee, his covenant is personal, and does not run with the land, and a subsequent grantee cannot recover against the husband thereon, unless he can prove its assignment to him: *Mygatt v. Coe*, 152 N. Y. 457, 57 Am. St. Rep. 521, 46 N. E. 949. Compare *Mygatt v. Coe*, 147 N. Y. 456, 42 N. E. 17; 142 N. Y. 78, 36 N. E. 870; 124 N. Y. 212, 26 N. E. 611.

Covenants of Warranty and of Quiet Enjoyment.—The covenant of warranty, as a general rule, runs with the land: *Gunter v. Williams*, 40 Ala. 561; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Ross v. Turner*, 7 Ark. 132, 44 Am. Dec. 531; *Blackwell v. Atkinson*, 14 Cal. 470; *Mitchell v. Warner*, 5 Conn. 497; *Butler v. Barnes*, 60 Conn. 170, 21 Atl. 419; *Leary v. Durham*, 4 Ga. 593; *Redwine v. Brown*, 10 Ga. 311; *Brady v. Spurck*, 27 Ill. 478; *Brown v. Metz*, 83 Ill. 339, 85 Am. Dec. 277; *Bostwick v. Williams*, 86 Ill. 65, 85

Am. Dec. 385; Claycomb v. Munger, 51 Ill. 373; Wead v. Larkin, 54 Ill. 489, 5 Am. Rep. 149; Illinois etc. Loan Co. v. Bonner, 91 Ill. 114; Blair v. Allen, 55 Ind. 409, 411; McClure v. McClure, 65 Ind. 482, 485; Thomas v. Bland, 91 Ky. 1, 14 S. W. 955; Lot v. Parish, 1 Litt. 393; Birney v. Hann, 3 A. K. Marsh. 822, 18 Am. Dec. 167; Cummins v. Kennedy, 3 Litt. 118, 14 Am. Dec. 45; Fitzhugh v. Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139; Succession of Cassidy, 40 La. Ann. 827, 5 South. 292; Fairbanks v. Williamson, 7 Me. 96; Fairbrother v. Griffin, 10 Me. 91; Donnell v. Thompson, 10 Me. 170, 174, 25 Am. Dec. 216; Baker v. Bradt, 168 Mass. 58, 46 N. E. 409; White v. Whitney, 3 Met. 81; Whitney v. Dinsmore, 6 Cush. 124, 128; Cole v. Raymond, 8 Gray, 217, 218; Ely v. Hergesell, 46 Mich. 825, 9 N. W. 435; White v. Presly, 54 Miss. 313; Real v. Hollister, 17 Neb. 661, 24 N. W. 333; Chandler v. Brown, 59 N. H. 370; Chapman v. Holmes, 10 N. J. L. 20, 30; Carter v. Denman, 23 N. J. L. 260; Suydam v. Jones, 10 Wend. 180, 25 Am. Dec. 552; King v. Kerr, 5 Ohio, 154, 22 Am. Dec. 777; Wilson v. Cochran, 46 Pa. St. 229; Le Ray de Chamnont v. Forsythe, 2 Penr. & W. 507; Whitehill v. Gotwalt, 3 Penr. & W. 313; Lawrence v. Senter, 4 Sneed, 52; Kenney v. Norton, 10 Helsk. 380, 386; Hopkins v. Lane, 9 Yerg. 78; Flaniken v. Neal, 67 Tex. 629, 4 S. W. 212; Rutherford v. Montgomery, 14 Tex. Civ. App. 319, 37 S. W. 625; Wilder v. Davenport, 58 Vt. 642, 5 Atl. 753; Clark v. Winchell, 53 Vt. 408; Russ v. Steele, 40 Vt. 310; Dickinson v. Hoomes, 8 Gratt. 353; note to Gibson v. Holden, 56 Am. Rep. 167.

As a covenant of warranty runs with the land, it is assignable and accompanies all conveyances of the same, and passes to each successive purchaser: Flaniken v. Neal, 67 Tex. 629, 4 S. W. 212; Wilder v. Davenport, 58 Vt. 642, 5 Atl. 753. It inures to the benefit of the last vendee: Rutherford v. Montgomery, 14 Tex. Civ. App. 319, 37 S. W. 625. As a covenant of warranty in a deed to the grantee runs with the land, its benefits may be claimed by a remote grantee: Claycomb v. Munger, 51 Ill. 373. Such a covenant generally extends to the heirs and assigns of the grantee. In fact, all covenants in deeds for the conveyance of lands which have respect to the title, and which were not broken when the land descended to the heir or passed to the assignee, are inherent or real covenants and attend the land; and on a breach happening, the heir or assignee injured thereby may sue the warrantor, his executor, or administrator, for the recovery of damages for such breach: King v. Kerr, 5 Ohio, 154, 22 Am. Dec. 777. Covenants of warranty in a deed for the conveyance of real property, not broken when made, pass with the title, even where the subsequent conveyances are made by quitclaim deeds: Troxell v. Stevens, 57 Neb. 329, 77 N. W. 781; Walton v. Campbell, 51 Neb. 788, 71 N. W. 737. "All the authorities agree that covenants for title run with the land, inure to the protection of the owner, for the time being, of the estate which they are intended to assure, and that they may be en-

forced, not only by the covenantee and his representatives, but by his heirs, devisees and alienees": *Crisfield v. Storr*, 36 Md. 129, 148, 11 Am. Rep. 480, per Grason, J. A warranty of title runs with the land, whether the words "heirs and assigns" be in the deed containing the covenant or not: *Hopkins v. Lane*, 9 Yerg. 78; and, in cases of successive warranties of title to land, the last vendee with warranty may maintain an action of covenant against the first or any other warrantor: *Lawrence v. Senter*, 4 Sneed, 51. Covenants of warranty may descend, through the operation of deeds which are mere naked releases, indefinitely from party to party: *Powers v. Patten*, 71 Me. 583, 587; *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504. A covenant of general warranty passes in a deed of conveyance without warranty so as to enable the second grantee to maintain an action for the breach of the covenant against the original grantor: *Cummins v. Kennedy*, 8 Litt. 118, 14 Am. Dec. 45; *Thomas v. Bland*, 91 Ky. 1, 14 S. W. 955. A covenant of warranty inures to the benefit of the assignee of the covenantee, who may bring an action for the breach of it in his own name against the original covenantor, without being affected by equities existing between the original parties: *Suydam v. Jones*, 10 Wend. 180, 25 Am. Dec. 552; *Illinois etc. Loan Co. v. Bonner*, 91 Ill. 114. A covenant of warranty is coextensive with the estate to which it is annexed, and when the estate ceases the warranty ceases: *Register v. Rowell*, 8 Jones, 812.

It has been held, however, that if the covenantor has no title to the land, the covenant of warranty of title cannot run: *Martin v. Gordon*, 24 Ga. 533; that the clause of general warranty cannot operate as a real covenant so as to pass to the assignee, unless the vendor has a capacity to convey the land itself to which the covenant is incident: *Randolph v. Kinney*, 3 Rand. 394; that if the grantor be not seised when he makes the conveyance, his covenant of warranty does not attach and run, and he is not liable to an action by the assignee of his grantee for its breach: *Slater v. Rawson*, 1 Met. 450; 6 Met. 438; and that a covenant of warranty in a deed passing no title does not run with the land, and is not assignable unless possession was taken under such deed: *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; but that where the covenantee, in a deed of land, takes possession and conveys, a covenant of warranty in the deed to him will pass to his grantee, although the covenantor was not in possession at the time of his conveyance: *Wead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 149. A covenant of warranty runs, although the grantor had neither the legal title nor the possession, when all the grantees have had possession: *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302; and in *Wilson v. Widenham*, 51 Me. 566, it was held that a covenant of warranty in a deed, given by one in possession, runs with the land, although the grantor had no title. The person who is the owner, or claims to be the owner, and is in possession at the time of a breach of a covenant

of warranty is the proper person to maintain an action upon the covenant: *Bradford v. Long*, 4 Bibb, 223; *Lot v. Parish*, 1 Litt. 393; *Nunnally v. White*, 3 Met. (Ky.) 584; *Crooker v. Jewell*, 16 Me. 527; *Chase v. Weston*, 12 N. H. 413; *Chandler v. Brown*, 59 N. H. 370; *Williams v. Wetherbee*, 1 Aiken, 233; *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414. A covenant of general warranty does not include a covenant against encumbrances: *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; and a covenant of warranty can never be treated as a covenant against encumbrances: *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909.

A covenant of warranty is said to be more than a covenant for quiet enjoyment, as the undertaking in the former is to defend, not the possession merely, but the land and the estate in it: *Williams v. Wetherbee*, 1 Aiken, 233; but these two covenants are, in their legal effect, generally considered to be one and the same: *Fowler v. Poling*, 2 Barb. 300; *Caldwell v. Kirkpatrick*, 6 Ala. 60, 41 Am. Dec. 36; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385. Covenants for quiet enjoyment are prospective in their operation, and the cases, English and American, are unanimous in holding that they run with the land: See the monographic note to *Chestnut v. Tyson*, 53 Am. St. Rep. 118, on the covenant for quiet enjoyment; *Campbell v. Lewis*, 3 Barn. & Ald. 392, 397; *Mitchell v. Warner*, 5 Conn. 497; *Butler v. Barnes*, 60 Conn. 170, 21 Atl. 419; *Redwine v. Brown*, 10 Ga. 311; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139; *Heath v. Whidden*, 24 Me. 383; *Shelton v. Codman*, 8 Cush. 318; *Russ v. Perry*, 49 N. H. 547; *Carter v. Denman*, 23 N. J. L. 260; *Beddoe v. Wadsworth*, 21 Wend. 120; *Rindskopf v. Farmers' etc. Trust Co.*, 58 Barb. 36; *Buck v. Binniger*, 3 Barb. 391, 403; *Jeter v. Glenn*, 9 Rich. 374; *Kenney v. Norton*, 10 Heisk. 380, 386. A covenant in a deed for quiet and peaceable possession runs with the land, and is binding upon the grantor and all of his subsequent grantees to the same land: *Schwallback v. Chicago etc. Ry. Co.*, 69 Wis. 292, 2 Am. St. Rep. 740, 34 N. W. 128. Covenants of warranty and of quiet enjoyment entered into jointly by the owner of the fee or one assuming to be its owner, and a stranger to the title, do not run with the land as against the stranger, and are not available in favor of a subsequent grantee who holds no assignment of the cause of action arising from a breach of the covenant: *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611; compare the same case, 142 N. Y. 78, 36 N. E. 870; 147 N. Y. 456, 42 N. E. 17; 152 N. Y. 457, 57 Am. St. Rep. 521, 46 N. E. 949; and see *Dean v. Shelby*, 57 Pa. St. 426, 98 Am. Dec. 235. A deed in the form prescribed by the Indiana statute for a warranty deed covenants that the grantor is seised of the premises; that he has a good right to convey; that he guarantees the quiet possession thereof; that the lands are free from encumbrances; and that the grantor will warrant and defend the title against all lawful claims. These covenants, including the one against encumbrances, run with the land: *Beasley v. Phillips*, Am. St. Rep., Vol. LXXXII—44

20 Ind. App. 182, 50 N. E. 488; *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260.

Miscellaneous Covenants.—The following covenants have been held to run with the land: A covenant by a third person, after a husband and wife have separated, to save the husband, his heirs and representatives, free from any claim of the wife to maintenance, alimony, or dower, in consideration of a conveyance by the husband to him of certain property in trust for the use and benefit of the wife: *Gaines v. Poor*, 3 Met. (Ky.) 503, 79 Am. Dec. 559; a covenant to bore for oil: *Bradford Oil Co. v. Blair*, 113 Pa. St. 83, 57 Am. Rep. 442, 4 Atl. 218; a covenant for laying out and perpetuating a street: *Story v. New York etc. R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; a covenant to maintain crossing-frogs, switchmen, and signals on a railway: *Louisville etc. R. R. Co. v. Illinois etc. R. R. Co.*, 174 Ill. 448, 51 N. E. 824; a covenant to divide the profits of gas taken from leased land: *Stone v. Marshall Oil Co.*, 188 Pa. St. 602, 41 Atl. 748, 1119; an antenuptial covenant by a woman to release her right of dower: *Carpenter v. Carpenter*, 40 Hun, 263; a covenant as to the mode of appointing appraisers: *Worthington v. Hewes*, 19 Ohio St. 66; a covenant to divide mineral taken from land on which contract work is done: *Crawford v. Witherbee*, 77 Wis. 419, 46 N. W. 545; a covenant by a railroad company to run daily passenger trains along and over a portion of its right of way conveyed to the company upon consideration that it would so run its trains: *Doty v. Railroad*, 103 Tenn. 564, 53 S. W. 944; a covenant to build and maintain a switch from a railroad to a mill, on land granted to the company, for the use of such mill: *Lydick v. Baltimore etc. R. R. Co.*, 17 W. Va. 427; a covenant not to assign or underlet, so far as it pertains to realty: *Williams v. Earle*, 9 Best & S. 740; L. R. 3 Q. B. 739.

A parol promise does not run with land, though a court of equity may enforce it: *Lydick v. Baltimore etc. R. R. Co.*, 17 W. Va. 427; and a stipulation for damages is not a covenant running with the land: *Atlanta etc. St. Ry. Co. v. Jackson*, 108 Ga. 634, 34 S. E. 184. A covenant of indemnity, by a lessee, does not run with the land: *Walsh v. Fussell*, 3 Moore & P. 457; nor does a covenant to maintain a portion of a highway: *Plymouth v. Carver*, 16 Pick. 183.

NOWACK v. METROPOLITAN STREET RY CO.

[166 N. Y. 433, 60 N. E. 32.]

EVIDENCE OF ATTEMPT TO BRIBE A WITNESS.—Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor is competent, but not conclusive as an admission by acts and conduct that his case is weak and his evidence dishonest.

CORPORATIONS—AGENT'S ACT IN TRYING TO BRIBE A WITNESS AGAINST.—When a corporation employs an investigator, with respect to the trial of actions against it, "to see to the witnesses," to take statements, and to interview witnesses, including those who expect to be, as well as those who are, witnesses, without limitation as to the means to be employed, the investigator's act to promote the interest of the corporation, by attempting to bribe a witness to testify falsely in its favor, is within the scope of the business intrusted to him, and is, therefore, the act of the corporation. Hence, evidence of such act is admissible against the corporation without proof of some corporate act expressly authorizing the agent to tamper with the witness.

Action for damages for personal injuries, alleged to have been caused through the negligence of the defendant company in running over the plaintiff with one of its horse-cars. One Klein was a witness on the trial for the plaintiff, and Harry Kaufmann, mentioned in the opinion, testified that he was employed by the defendant as an investigator; that his duties were "to see to the witnesses and take statements and to interview witnesses," those who "expect and those who are" witnesses; and that he had been acting in this case for the defendant. After Klein had testified that he had had a conversation with Kaufmann, upon a certain occasion, in reference to the testimony that he was to give upon the trial, he was asked these questions: "What conversation did he have with you in reference to the testimony you were to give upon the trial of this action? Did Harry Kaufmann make any offer to you of money or any other thing in reference to the testimony you were to give upon the trial of this action?" Each of these questions was objected to upon the ground that it was incompetent, immaterial, and irrelevant. The objections were sustained and the plaintiff excepted. There was a judgment for the defendant, which was affirmed by the appellate division, and the plaintiff appealed.

Harold Nathan and Frederic E. Perham, for the appellant.

Charles F. Brown and Henry A. Robinson, for the respondent.

⁴³⁷ VANN, J. Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor, although collateral to the issues, is competent as an admission by acts and conduct that his case is weak and his evidence dishonest. It is somewhat like an attempt by a prisoner to escape before trial, or to prove a false alibi, or by a merchant to make way with his books of account, except that it goes farther than some of these instances, for in addition to reflecting on the case, it reflects upon the evidence on that side of the controversy. "Where it appears that on one side there has been forgery or fraud in some material parts of the evidence, and they are discovered to be the contrivance of a party to the proceeding, it affords a presumption against the whole of the evidence on that side of the question, and has the effect of gaining a more ready admission to the evidence of the other party": 1 Phillips on Evidence, Cowen and Hill's Notes, 627. It is not conclusive, even when believed by the jury, because a party may think he has a bad case when in fact he has a good one, but it tends to discredit his witnesses and to cast doubt upon his position. It is for the consideration of the jury, after ample opportunity for explanation and denial, under proper instructions to prevent them from giving undue attention to the collateral matter to the detriment of the main issue.

The leading authority in support of such evidence is an English case, decided after careful argument by counsel and upon full discussion by the judges: *Moriarty v. London etc. Ry. Co.*, L. R. 5 Q. B. 314. It is also sustained by the cases in this state relating to the subject, some with and some without discussion: *Cruikshank v. Gordon*, 118 N. Y. 178, 187, 23 N. E. 457; *Gray v. Metropolitan St. Ry. Co.*, 165 N. Y. 457, 459, 59 N. E. 262; *Mather v. Parsons*, 32 Hun, 338; *Gulerette v. McKinley*, 27 Hun, 320; *Adams v. People*, 9 Hun, 89. It is received even in criminal actions: *People v. Rathbun*, 21 Wend. 509; *Gardiner v. People*, 6 Park. C. C. 155, 205; *Donohue v. People*, 56 N. Y. 208. The same rule prevails in other states, without exception, so far as we have been able to discover: *Egan v. Bowker*, 5 Allen, 449; *State v. Nocton*, 121 ⁴³⁸ Mo. 537, 551, 26 S. W. 551; *Heslop v. Heslop*, 82 Pa. St. 537, 539; *Snell v. Bray*, 56 Wis. 156, 162, 14 N. W. 14; *Lyons v. Lawrence*, 12 Ill. App. 531; *People v. Marion*, 29 Mich. 31; *Commonwealth v. Webster*, 5 Cush. 295, 316, 52 Am. Dec. 711. The elementary writers sanction it, some notwithstanding they con-

cede it to be collateral and others upon the ground that as it relates to good faith or the intent of a party, it is a material fact and has a direct bearing on the issue: 1 Taylor on Evidence, 9th ed., 242; 1 Greenleaf's Evidence, 15th ed., sec. 196; Wheaton on Evidence, sec. 1265; 1 Starkie's Evidence, 437; 11 Am. & Eng. Ency. of Law, 2d ed., 503.

It is claimed, however, that such evidence is not admissible against a corporation without proof of some corporate act expressly authorizing an agent to tamper with witnesses. This is equivalent to claiming that such evidence cannot be received against corporations at all, because in the nature of things proof of express authority would be impossible. A corporation can act only through agents, and where a branch of its business, whether broad or narrow, is intrusted to an agent, without any restriction, whatever he does which directly relates to that part of the corporate business and tends to promote it is binding upon the corporation. Under such circumstances he has control of the method of action, and that which he does, whether morally right or wrong, within the general scope of the matter intrusted to him, in legal effect is done by the corporation itself. Having authority to accomplish a certain result, with no limitation as to the means to be employed, his acts, so far as they directly contribute to that result, even if unlawful, are corporate acts. They are done for the corporation by an agent clothed with general authority to effect a certain purpose, which they aid in attaining. Any admission made by him through acts done to carry on his branch of the business, and which reasonably tend to advance it, is regarded in law as made by the corporate body which authorized him to act for it with reference to the subject of his employment.

Kaufmann was employed to look up and "see to" witnesses for the defendant, so as to enable it to defeat the plaintiff's claim, among others. He was to find witnesses, if possible, who would swear to such a state of facts as would prevent a recovery against the defendant. The method of doing this was left to his judgment and discretion. If he adopted a method not contemplated by the defendant, still it is responsible for what he did in the line of his employment to promote its interest. In order to promote its interest he saw fit, as we must now assume, to use the power intrusted to him by trying to bribe the most important witness for the plaintiff to testify falsely in favor of the defendant. He was employed "to see to

the witnesses," and this was his manner of seeing to them. He was to procure evidence, the method not being specified, and he tried to get it by an unlawful method. The subject was left to his judgment, and he acted according to his judgment. The scope of the business intrusted to him included whatever he thought best to do in order to get the right kind of witnesses. He was not working for himself, but for the defendant, and, as he represented it with reference to the subject of witnesses, his conduct not only tended to show that its case was weak, for witnesses are not bribed unless it is thought necessary, but to cast a doubt upon the testimony of the other witnesses who were looked up by him and sworn by the defendant. It indicated as the result of his investigation for the defendant that honest witnesses could not be procured who would swear to a defense. If he could not make a mere admission as such, he could do an act which had the effect of an admission. His declarations, *dum fervet opus*, were acts. Those acts, if shown, would have reflected upon the integrity of the defendant's case as presented in court through the medium of witnesses, and would have tended to prevent the verdict which was rendered in its favor. They would have afforded "a presumption against the whole of the evidence" for the defendant, which has served it so well. It has had the benefit of what he did with reference to the other witnesses, unaffected by the cloud which the evidence offered would have cast upon them. He was acting in the course of his employment, for he was employed to procure witnesses. The ⁴⁴⁰ power of the corporation was intrusted to him with reference to that subject, to be used as he saw fit. His acts related solely to that subject, and were done by him as its agent, wholly for its benefit.

If this evidence would have been admissible against an individual defendant, who had employed Kaufmann as he was employed, it is admissible against this corporate defendant. If an honest man by mistake employs a dishonest one to look up witnesses for him, and the latter, through excess of zeal, resorts to bribery, although it was never thought of by his employer, it is better for cleanliness and purity in the administration of justice that the facts should be shown, with the fullest opportunity for explanation, than to exclude all evidence of the evil acts upon the ground that they were not authorized, because authority may properly be inferred from the nature of the employment. In such a case all doubt

should be resolved, if possible, in the interest of clean evidence and the exposure of foul practices.

There are but few authorities which bear directly upon this branch of the subject. We have the general rule that a principal is liable to a third person in a civil action for the fraud or other malfeasance of his agent, perpetrated by the latter in the course of his employment, although the act was ultra vires and the principal did not authorize, justify or know of it: *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, 28 Am. St. Rep. 632, 30 N. E. 1001; *Fifth Ave. Bank v. Forty-second street etc. R. R. Co.*, 137 N. Y. 231, 33 Am. St. Rep. 712, 33 N. E. 378; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 51 Am. St. Rep. 727, 43 N. E. 68; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Stewart v. Brooklyn etc. R. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185. As was said in an important case in England: "If the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation": *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 86, 87. So this court has declared that "where authority is conferred to act for another without special ⁴⁴¹ limitation, it carries with it by implication authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force toward or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes as to third persons the discretion and act of the master, and this although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business and was acting within the general scope of his employment. . . . In most cases where the master has been held liable for the negligent or tortious act of the servant, the servant acted not only without express authority to do the wrong, but in violation of his duty to the master": *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129, 133, 21 Am. Rep. 597. So far as this rule rests upon estoppel, it does not apply to the question before us, but so far as it rests upon public policy or convenience, it has some bearing, for the interest of the public is promoted by the exposure of corrupt acts intended to turn the course of justice.

The authorities directly in point, so far as they have been called to our attention, with one exception, support the theory

that the evidence in question should have been received. In the leading case evidence was admitted to show that a clerk in the employ of the defendant, a railroad corporation, offered money to a witness for the plaintiff to influence his testimony in favor of the company. It was the duty of the clerk to look up and arrange the evidence in cases where the company had been sued by persons injured, without special directions and with general authority to use his own judgment. It expressly appeared that he had no authority "to deal with a witness in any way," and that if he had used money to suborn a witness he would have been instantly discharged. The court, referring to the authority of the clerk, said: "He was empowered generally to perform that duty without special directions. That part of the business of the company was placed in his charge with general authority to use his judgment in its performance. His acts, therefore, were the acts ⁴⁴² of the company within the scope of his employment. His legal authority, of course, but extended to lawful acts. So it is true of all agencies, as they are not appointed for the purpose of committing wrong or the performance of illegal acts except in rare cases. Few actions would be maintainable if a recovery could be had only in cases where express authority is given, or the agent is required to commit the wrong. . . . In this case the clerk was in the exercise of a corporate power, engaged in the performance of a duty delegated to him by the company, and in the performance of that duty he attempted the use of illegal means for the accomplishment of a legal end and for the benefit of the company. He did not attempt to suborn the witness for the benefit of himself, but for the benefit of the company—not with the consent of his superior, but in the course of the legitimate and authorized business of the company. He was unquestionably employed by the company, was acting for it and did the act to promote its interest. He was engaged in the performance of a duty for the company—he did the act as a part of the duty, although unauthorized. We are, therefore, of the opinion that he performed the illegal and unauthorized act while acting in and as a part of his employment, and we must hold the company is responsible for the act. For that reason we hold that the evidence was admissible": *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29.

In *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14, a man who expected to be sued requested a friend to write to an acquaintance,

but did not authorize him to attempt to influence her testimony if she was called as a witness on the other side. The friend wrote to this person warning her not to aid the other party or testify in the action, and it was held that the letter was properly received in evidence, as an admission by conduct, although it was written before the action was commenced.

In *Baltimore etc. R. R. Co. v. Rambo*, 59 Fed. 75, it was said that "it was competent for the plaintiff to introduce evidence in rebuttal tending to show that the authorized agent of the Baltimore & Ohio Railroad Company had ⁴⁴⁸ been engaged in suborning witnesses to testify falsely. Such evidence was relevant on the main issue as tending to show an admission by its conduct that it had a bad case, needing false and perjured evidence to support it."

In *Green v. Woodbury*, 48 Vt. 5, it was held that evidence was not admissible to show that a constable employed to subpoena witnesses and assist in the defense of a town had offered inducements to one of the plaintiff's witnesses to keep away from the trial, when it did not appear that any other officer or agent of the town was cognizant of, authorized, or approved the act.

The rule laid down by the supreme court of Illinois in the case cited is the better calculated to advance justice by keeping its channels pure. It tends to prevent perjury and fraud and to strengthen the confidence of the people in the courts. Upon principle, as well as according to the weight of authority, proof of Kaufmann's attempt to bribe Klein to swear falsely for the defendant should have been received.

The judgment should be reversed and a new trial granted, with costs to abide the event.

LANDON, J., dissenting. When the servant, by the act of executing his master's business, does wrong to the injury of another, the master is liable, although he had not authorized the wrong. But when such unauthorized wrong of the servant does no injury to anyone, the master should not be punished for his servant's sin. That is this case. There is much authority the other way. It rests in great part upon the praiseworthy desire to punish the offender's attempt upon the purity of justice. But this will not justify imputing to the innocent the wrong of the guilty. Some evidence tending to support the inference of permission or acquiescence on the part of the master should be given. I advise affirmance.

Parker, C. J., Bartlett and Martin, JJ., concur with Vann, J., for reversal.

O'Brien and Haight, JJ., concur with Landon, J., for affirmance.

A PRINCIPAL IS LIABLE FOR THE ACTS OF HIS AGENT, done in the course of the performance of the principal's business, whether the agent is authorized or not, so long as such acts are civil in their nature; but he is not liable for criminal or penal acts of his agent unless done by his authority, assent, or approval: *Hall v. Norfolk etc. R. R. Co.*, 44 W. Va. 38, 67 Am. St. Rep. 757, 28 S. E. 754; and see *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 51 Am. St. Rep. 727, 43 N. E. 68. The tortious act of a servant, within the scope of his duty, is the act of the master himself: *Bergman v. Hendrickson*, 108 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 804; and the act of the agent of a corporation, necessarily acting through agents, is, within the scope of his delegated authority, the act of the corporation, for which the latter must respond to the other servants and strangers alike: *Little Pittsburg etc. Min. Co. v. Little Chief etc. Min. Co.*, 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760.

PEOPLE ex rel. LEMMON v. FEITNER.

[167 N. Y. 1, 60 N. E. 265.]

TAXATION—MEMBERSHIP IN STOCK EXCHANGE.—A seat in the New York Stock Exchange, while property in a certain sense, is not such personal property as is taxable under the statutes of New York if owned by a resident, and it is not taxable when owned by a nonresident, under a statute providing that the personal property of nonresidents is taxed "to the same extent" as if owned by a resident.

CAPITAL INVESTED IN BUSINESS.—THE VALUE OF A SEAT IN THE NEW YORK STOCK EXCHANGE is capital invested in business in that state, since such seat is essential to successfully carry on the business of a broker.

John Whalen, corporation counsel, and James M. Ward, for the appellant.

Lewis Cass Ledyard, for the respondent.

BARTLETT, J. The relator is, and for many years has been, a resident of New Jersey and was such on the second Monday of January, 1899; during all that time he transacted business in the city of New York as a broker in stocks, and has been a member of the New York Stock Exchange since the year 1872, having paid for his membership at that time about the

sum of four thousand dollars. On the second Monday of January, 1899, he was assessed on his said membership at a valuation of twenty thousand dollars. This assessment is based on chapter 908, section 7, of the Laws of 1896, known as the tax law, which reads as follows: "Nonresidents of the state doing business in the state, either as principals or partners, shall be taxed on the capital invested in such business, as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state."

The question presented for our determination is whether the value of a seat in the New York Stock Exchange, owned by a nonresident member, doing business in this state, is to be regarded as capital invested in business, as personal property, within this state. The section quoted, while it has been subjected to some verbal changes, is a substantial re-enactment of the Laws of 1855, chapter 37, section 1: *People v. Barker*, 157 N. Y. 159, 51 N. E. 1043.

In the act of 1855 nonresidents were taxed "on all sums invested in any manner in said business, the same as if they were residents of this state," and in the present tax law they are taxed "on the capital invested in such business, as personal property, at the place where such business is carried on."

⁴ We have been cited to a large number of cases in this and other states, and the federal courts, which deal with the general question as to the rights of creditors to the seat of a debtor in various business exchanges. We shall content ourselves, however, with an examination of the rights and liabilities of the relator under the rules of the New York Stock Exchange and such cases as have settled the law relating thereto in this state.

The petition sets forth in part the constitution and by-laws of the New York Stock Exchange, as existing at the time the relator was admitted to membership, and also as modified prior to the year 1899. For the purposes of this case it is only necessary to consider a few of the salient features of these instruments. The New York Stock Exchange is a voluntary unincorporated association composed of more than one thousand members, many of whom are nonresidents but engaged in business in the city of New York. The principal purposes and objects of the association are the affording to members facilities for the transaction of business as brokers in stocks, bonds, and other securities, the providing for a convenient ex-

change or salesroom for the transaction of such business, and the maintenance of rectitude and honorable dealings between its members in their business transactions. The governing committee appoints a standing committee from its own members known as the "committee on admissions." A candidate for admission is elected to his seat in the exchange by a two-thirds vote of this committee, which consists of fifteen members. A member has the right to sell his membership by submitting the name of the proposed purchaser to the standing committee, and if it approves of the transfer it may be made, provided the member selling has no unsettled contracts. When a member dies his membership may be sold by the secretary of the committee on admissions, and, after satisfying the claims of the members of the stock exchange, he is to pay the balance to the legal representatives of the deceased. There are also provisions for the disposition of the seat of a member who has been deprived of his membership ⁵ by the act of the governing committee, which need not now be considered.

The relator contends that his membership is purely a personal privilege, and the value thereof cannot be regarded as a sum invested in business in this state. If it be admitted that a seat in the exchange is in a certain sense personal property, it does not advance the argument in support of the contention that its value is to be regarded as invested in business conducted by the owner. The New York Stock Exchange transacts no business as such in the buying and selling of stocks. Its main object, as already stated, is to afford its members the facility for the transaction of business by providing them with a convenient exchange or salesroom. The business therein transacted is that of the individual members, and the conveniences afforded by the exchange renders it practicable to carry on with speed and safety the enormous dealing in stocks and other securities incident to the great money center of the country.

It may be well, however, to ascertain to what extent this court has decided that a seat in an exchange is personal property. In *Platt v. Jones*, 96 N. Y. 24, it was held that a membership in the New York Stock Exchange was, in a certain sense, property, and that it passed to the assignee in bankruptcy of the owner. After the discharge of the debtor he continued to do business as a member of the exchange, and the assignee sought in this action to compel him to execute and deliver a proper transfer of his seat or membership. This

court held that the action was premature, as it did not appear that the assignee had applied to the exchange to have his rights recognized or that the exchange had denied his rights, or that he had nominated any person to the exchange in the place of the defendant or attempted to have anyone elected. It was further suggested that the right of the plaintiff assignee was in nowise prejudiced by the fact that the exchange saw fit to allow this member to exercise his privileges after such rights as he possessed had passed to the assignee in bankruptcy, and that the exchange, on due application, might permit the person nominated by the assignee to become a member on conforming to its rules. Judge Earl, in writing for this court, said: "There can be no doubt that a seat or membership in the exchange is, in a certain sense, property. It has great value to the owner or possessor, and may, under conditions prescribed in the constitution and by-laws, be transferred and transmitted and converted into money": See cases cited. "The question as to the character of the property of such a seat is so fully discussed in the authorities cited that nothing more is necessary to be added."

In *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301, it was held that a membership in the New York Cotton Exchange was property, and as such passed to a receiver appointed in supplementary proceedings on an execution against the owner, and that the receiver had a right to redeem the seat when it had been pledged by the judgment debtor as collateral for a loan. The transfer of a seat in the cotton exchange is not subject to the same restrictions as in the New York Stock Exchange; in the former a transfer may be made without the action of any committee or consent of the exchange, to any fellow-member or any member-elect, subject to certain restrictions that are not material to consider.

Judge Finch, writing for the court, said: "We think the right of the judgment debtor to a seat in the cotton exchange was property. That it had value was proved and is conceded; and that it could be transferred to a certain class of purchasers, under prescribed rules and conditions, is also established. The defendant took it as collateral to the note of Robbins and held it as security for that debt, and thereby plainly treated it as valuable property. Although of a character somewhat peculiar, its use restricted, its range of purchasers narrow, and its ownership clogged with conditions, it was, nevertheless, a valuable right, capable of transfer and correctly decided to be

property: *Hyde v. Woods*, 94 U. S. 524; *Ritterband v. Baggett*, 10 Jones & S. 556, 42 N. Y. Super. Ct. 556; *Grocers' Bank v. Murphy*, 11 Week. Dig. 538; *In re Keeham*, Daily Reg., Feb. 9, 1880."

Judge Choate, while sitting in the United States district court for the southern district of New York, held that a seat in the New York Stock Exchange was property which passed to the assignee in bankruptcy: *In re Ketchum*, 1 Fed. 840.

We have been cited to the case of *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. Rep. 495, 17 N. E. 225, as having a bearing on the subject under consideration. In that case a member had been expelled from the New York Stock Exchange, and his assignee sued the exchange to recover the proceeds received by it from a sale of the membership or seat involved. It was held that these proceeds did not belong to the expelled member, but to the exchange and might be disposed of as it directed.

This court has thus held that a seat in the New York Stock Exchange is, in a certain sense, property, and possessed of considerable value, and that an assignee in bankruptcy takes such interest as the owner has, and may realize thereon if the governing committee decides to recognize and seat the proposed transferee.

We have been cited to no case where the stock exchange has admitted to membership the purchaser at a judicial sale. The court has no power to compel such action, and the probability of a creditor reaching a favorable result by selling the seat of a member is, to say the least, exceedingly remote.

The record before us discloses that, where a member voluntarily contracts to sell his seat, it is always upon the condition that the agreement shall be void unless the proposed transferee is elected by the admissions committee.

This membership, while in a certain sense personal property "clogged with conditions," is clearly not such personal property as is taxable under the laws of this state.

The tax law (Laws 1896, c. 908, sec. 2, subd. 4) defines personal property as follows: "The terms 'personal estate,' and 'personal property,' as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond, or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; debts due by inhabitants of

this state to persons not residing within the United States for the purchase of any real estate; public stocks, stocks in moneyed corporations, and such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate."

Section 3 of the tax law, in defining the property liable to taxation, says: "All real property within this state, and all personal property situated or owned within this state, is taxable unless exempt from taxation by law." The tax law then provides for the taxation of nonresidents in section 7, already quoted.

The counsel for the appellants states in his brief as follows: "In order to tax the property of citizens of this state that property, under the provisions of the tax law, must be either real or personal: Laws 1898, c. 306, sec. 3. And unless the property sought to be taxed comes within the definitions of the statute defining real and personal property, it is, of course, not taxable. It is clear that property of the nature of a membership or seat in the stock exchange is not within the definitions of subdivision 4 of section 2 of chapter 908 of the Laws of 1896, and therefore would not be assessable for purposes of taxation to a resident owner."

This admission is most significant, and it brings us to the consideration of the remaining question in the case, whether a nonresident member of the New York Stock Exchange can be assessed on the value of his seat, although a resident member is not taxable.

The language of section 7 of the tax law is that nonresidents shall be taxed "to the same extent as if they were residents of the state."

The learned appellate division, in commenting on this language, said: "That means necessarily that he is to be taxed upon the same sort of property, and that property is to be valued at the same rate as if it belonged to a resident."

We are of opinion that the language of the statute admits of no other construction.

• The counsel for the appellants challenges this construction and cites *People v. Barker*, 141 N. Y. 118, 35 N. E. 1073, as establishing a contrary view. It was there held that foreign corporations doing business in this state are to be regarded as nonresidents under the statute and taxable on all sums invested in their business. Also, that a person or corporation so liable to assessment and taxation is not entitled to a deduction of debts.

Judge Peckham's opinion is very explicit and does not support the appellants' argument. The learned judge points out that debts are not deductible, as it is to be assumed that the nonresident will have all his deductions adjusted at the place of his domicile. He then states as follows: "In using the expression, 'the same as if they were residents of this state,' we do not think it was intended that exceptions were to be allowed here the same as if the party were a resident, or that deductions from the sum should be made as if that were the case. It means, as it seems to us, that the sum invested in any manner in business in this state should be assessed in the same manner and form as a resident would be assessed."

The relator is liable to be assessed on his capital invested in business in this state in the same manner and form as a resident would be assessed. Neither the resident nor the nonresident can be taxed on personal property other than that which is declared to be such by the tax law.

It being admitted that the definition of personal property as contained in the tax law does not include a membership in the New York Stock Exchange, it would seem to be decisive of this case. We are, however, of opinion that, without regard to the point just considered, the value of a seat in the New York Stock Exchange is not capital invested in business in this state. A broker in the purchase and sale of stocks and bonds, who neither receives nor delivers stocks, but merely conducts the transaction on the floor of the exchange, giving up the name of the purchaser or seller to his principal, is in the position of one rendering services and cannot be regarded as conducting a business in which capital is invested in the ¹⁰ legal sense. The money that he has paid for his membership or seat is for the mere facility to transact his particular business and to surround it with such safeguards of rectitude and honorable dealing as tend to promote both rapidity and safety in his transactions. It is apparent that the value of this seat or membership, while enabling the relator to carry on his business with facility and safety, does not fall within any of the definitions of invested capital.

In *Bailey v. Clark*, 21 Wall. 286, the supreme court of the United States defined capital to mean "property taken from other investments or uses and set apart for and invested in the special business, and in the increase, proceeds, or earnings of which property, beyond expenditures incurred in its use, consist the profits made in the business."

In *Lyon v. Zimmer*, 30 Fed. 410, is found this definition: "Capital is the fund dedicated to a business to support its credit, to provide for contingencies, to suffer diminution from loss, and to derive accretion from gains and profits."

In *Bouvier's Law Dictionary*, volume 1, page 283, capital is defined as: "The sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership."

In *McLean v. Jephson*, 123 N. Y. 146, 25 N. E. 409, which was a construction of the act of 1855, taxing nonresidents "on all sums invested in any manner in said business," this court said: "To authorize an assessment under this statute, it is essential that the person assessed shall in fact have money invested in a business carried on by him in this state, either as a principal or partner."

Webster defines "invest" as: "To lay out money or capital in business, with a view of obtaining an income or profit; as to invest money in bank stock."

The general understanding of the term "investment" is taking a given sum of money and placing it where it will produce an income, either as the profit of capital in a commercial venture, or in the form of interest earned by bonds, stock, and other securities.

¹¹ The sum which the relator paid in order to gain admission to the floor of the New York Stock Exchange, where he might meet from time to time a thousand other brokers having stocks to purchase or sell, is in no proper legal sense an investment of capital in a business that he was conducting in the state of New York upon which he expected to reap the profits of a successful venture.

The order appealed from should be affirmed, with costs.

VANN, J. I concur in the result because a seat in the New York Stock Exchange is not personal property under the somewhat restricted definition of the tax law: Laws 1896, c. 908, sec. 2. If owned by a resident it would not be taxable according to that definition, and when owned by a non-resident, it is taxable only "as personal property . . . to the same extent" as if owned by a resident: Laws 1896, c. 908, sec. 7.

I do not concur, however, in the conclusion that "the value of a seat in the New York Stock Exchange is not capital invested in business in this state." Money is capital, and when money is invested in facilities or appliances to do busi-

ness with, it is capital invested in the business to which the facilities or appliances are essential in order to carry it on successfully. Thus, the money expended for the library of a lawyer, the implements of a surgeon, the patent rights of a manufacturer, or the copyrights of a publisher, is capital invested in business, because the business cannot be carried on without it. Whenever one has to buy some right in order to carry on a certain business, the sum so expended is capital invested in that business. Money is invested in business when it is invested in the means of carrying on business. Membership in the New York Stock Exchange is essential to the business of a broker, such as the relator carried on, and the money that it cost is capital invested in the business. The test is, Could the business be as successfully carried on without it? The exchange is a great market for the sale of property of a certain kind, such as the relator dealt in, and right of access to the market is necessary in order to deal with any success in ¹² that kind of property. Without that right the business of a broker would be so restricted as to be unworthy of the name. The relator, therefore, could not have carried on his business with substantial profit, or as he has carried it on, without investing enough capital to procure the rights and facilities afforded by membership in the Stock Exchange. His business would necessarily have been limited and insignificant unless he had made that investment, which, when made, as we have held, was property: *Platt v. Jones*, 96 N. Y. 24. Capital is invested when property is purchased with it, and capital is invested in business when it is expended in the purchase of property that is essential in order to carry on that business. While the relator bought and sold securities for others, he could have bought and sold for himself, and, if his sole business was buying and selling for third persons, he could not have carried it on without access to the market. The money used by him to buy his seat was neither thrown away nor given away, but was paid for property of great value, which was the main instrumentality for carrying on the business in which he engaged. It is difficult for me to see what was done with the money unless it was invested.

While the necessity of an election to membership may affect the value of a seat in the exchange, it has no bearing upon the question whether the money used to purchase a seat is capital invested in business. It may be that some men cannot effectively purchase the right to do business in the exchange, but

that does not alter the fact that it requires the investment of capital to procure the right by all who succeed in getting it. While one must pay what a seat is worth, and also obtain consent of the governing committee before he can become a member, the sum paid is capital, notwithstanding something else is required to effect the purchase. If consent were all, as is the case with social clubs, no capital would be required, but it is not all, for more than fifty thousand dollars must be paid for the right to do business in the exchange, even if consent is obtained. While the form of the investment is peculiar, it is property that must be had in order to carry on the business of a broker. ¹³ It is not a mere personal privilege, for it has a market value and can be bought and sold, although transfers are hampered somewhat by reasonable conditions, designed to maintain the moral character and business standing of the members.

I think the value of the seat of the relator is capital invested in business, but that it is not taxable, because the taxing statute does not cover it.

Gray and Werner, JJ., concur with Bartlett, J.

Vann, J., concurs in memorandum, with whom Parker, C. J., Martin and Cullen, JJ., concur.

TAXATION.—A SEAT IN A STOCK or exchange board is not taxable property: San Francisco v. Anderson, 103 Cal. 69, 42 Am. St. Rep. 98, 86 Pac. 1034.

WIELAND v. DELAWARE AND HUDSON CANAL CO.

[167 N. Y. 19, 60 N. E. 234.]

NEGLIGENCE—PROOF, BURDEN OF.—In an action to recover damages due to the negligence of another, the burden is on the plaintiff to establish both the negligence of the defendant and that the plaintiff was free from contributory negligence.

NEGLIGENCE — CONTRIBUTORY — ABSENCE OF — AFFIRMATIVE PROOF.—In an action to recover damages for the death of another, due to the defendant's negligence, where there is neither direct nor circumstantial evidence which indicates either the presence or the absence of contributory negligence on the part of the deceased, the plaintiff, in order to recover, must give some affirmative evidence from which a jury can find that the decedent was free from contributory negligence.

Lewis E. Carr, for the appellant.

Jacob L. Ten Eyck, for the respondent.

23 WERNER, J. It has become a truism in the law of negligence that each case depends upon its own particular facts. This branch of the law is now well settled, and the great diversity of decisions in negligence cases arises, not from differences between the courts as to what the law is, but in the effort to apply it to the facts of each given case. We have here a case governed by the most fundamental and primary principles of the law of negligence. The two questions involved are: 1. Was the defendant guilty of negligence? and 2. Was the plaintiff's intestate free from contributory negligence? The burden was upon the plaintiff to establish each of these propositions. The sufficiency of the evidence to warrant a finding of negligence against the defendant being conceded, we have to inquire whether there is evidence upon which a jury could properly find that plaintiff's intestate was free from contributory negligence, or whether the circumstances and surroundings attending the accident were such that no degree of care on the part of the decedent would have been availing. As there were no eye-witnesses to the accident and the decedent was last seen about a quarter of a mile north of the crossing at which he was killed, the case is barren of direct evidence upon the subject of his conduct in approaching and attempting to go over this crossing. The record is equally silent as to any circumstances which may **24** have attended the decedent's approach to this crossing and which would bear directly upon what he did or omitted to do. It is quite clear, therefore, that this case does not come within the principle of those authorities which lay down the rule that even where there are no eye-witnesses to an accident resulting in death, the question of decedent's contributory negligence may depend upon inferences to be drawn by the jury from the circumstances attending the accident: *Smedis v. Brooklyn etc. R. R. Co.*, 88 N. Y. 20; *Kellogg v. New York Cent. etc. R. R. Co.*, 79 N. Y. 75; *Palmer v. New York Cent. etc. R. R. Co.*, 112 N. Y. 234, 19 N. E. 678; *Schafer v. Mayor etc.*, 154 N. Y. 466, 48 N. E. 749; *Pruey v. New York Cent. etc. R. R. Co.*, 41 App. Div. 158; 58 N. Y. Supp. 797; affirmed in this court, 166 N. Y. 616, 59 N. E. 1129. Here there are no facts or circumstances from which a jury could say what the decedent did or omitted to do when he approached this crossing.

We are thus brought to the last and principal contention of the plaintiff, which is that the character of the crossing and the conditions surrounding the accident were such that the decedent could neither have seen nor heard the approach of the train with which he collided in time to save himself. If this is true the case is brought within the other rule laid down in *Smedis v. Brooklyn etc. R. R. Co.*, 88 N. Y. 20, *Palmer v. New York Cent. etc. R. R. Co.*, 112 N. Y. 234, 19 N. E. 678, *Kellogg v. New York Cent. etc. R. R. Co.*, 79 N. Y. 75, and *Truey v. New York Cent. etc. R. R. Co.*, 41 App. Div. 158, 58 N. Y. Supp. 797, to the effect that when the circumstances and conditions surrounding an accident are such that it is unavailing to look and to listen the question whether a decedent was free from contributory negligence may be submitted to the jury. Let us briefly recapitulate the facts and circumstances upon which this contention is based. The accident happened about noon on a bright, clear day at a country highway crossing of a single-track railroad. The decedent was a man of mature years, in good health, in the possession of all his faculties, and thoroughly familiar with this crossing. He was driving a gentle, easy-going horse, which when last seen, about a quarter of a mile north of this crossing, was jogging along on a slow ²⁵ trot. We must assume from the evidence that no bell or whistle was rung or sounded until an instant before the accident, when two short, sharp blasts of the whistle were given, and that this was probably the danger signal occasioned by the decedent's presence upon, or proximity to, the track instead of the usual or ordinary warning whistle for the crossing. It is impossible to describe in words the precise character of this crossing. As shown in the preceding statement of facts, the railroad approaches this highway from the west through a cut and upon a curve over six hundred feet in length. The sides of the cut are sloping, and in some places upward of forty feet in height. The physical situation at the intersection of this railroad and highway is such that a better view is obtained of the railroad along this curve at a point in the highway about thirty feet north of the track than at any other place. At this point the track is plainly visible to the west for a distance of from one hundred and fifty to two hundred feet; or according to the evidence of one of plaintiff's witnesses from four hundred and twenty-five to four hundred and fifty feet. The latter witness also testified that an object twelve or thirteen feet high, the assumed height of a locomotive, could be seen from the same

point for a distance of six hundred feet to the westward. At the point stated a train coming from the west through this cut could not be heard until it came within one hundred and fifty or two hundred feet of the crossing, and, as there was a slight wind from the east on the day of the accident, it may properly be assumed that the train could not have been heard until after it came into view. The evidence also tends to show that after leaving the point in the highway thirty feet north of the railroad track, the view to the west is considerably shortened until the railroad track is reached, when the view is again somewhat extended, but still not as good as at the point indicated. The train with which decedent collided was moving at the rate of fifty or sixty miles an hour, giving no other signal or warning of its approach than that above referred to. These facts show that this was an exceedingly dangerous crossing. It was rendered so, however, not by the shifting or variable conditions of the railroad traffic at this point, but principally by the fixed and constant ²⁶ physical environment above described. The decedent, who was perfectly familiar with the surroundings, approached this crossing on the day of the accident under very favorable conditions as to time and weather. He was bound to exercise reasonable care for his self-preservation; that is, he was bound to exercise that degree of care which a reasonably prudent man would use, knowing the kind and extent of the danger to be apprehended. What active duty was imposed upon the decedent in the exercise of reasonable care? The answer is obvious and simple. He was required to look and listen. Nothing could excuse the absence of this degree of care, or justify the lack of evidence tending to show that it was exercised, except proof that under the conditions which existed it would have been unavailing. Did the decedent either look or listen before he went upon this railroad track? We can find no answer to this question in the record. As we have stated, there is not a single fact or circumstance in the evidence which sheds any light upon the decedent's movements between the time when he was seen a quarter of a mile north of the railroad track and the instant when he met his death. Could he have heard if he had listened, or could he have seen if he had looked? The evidence shows affirmatively that neither of these safeguards would have been unavailing. Upon the facts before us it must be assumed that the situation was one in which it was difficult either to hear or see in time to avoid danger. But it was possible to hear and to see, and, therefore, it was the duty

of the decedent to use his faculties of sight and hearing in the exercise of such reasonable care as the known danger of the place required. Had the evidence shown, or tended to show, that either or both of these precautions would have been utterly useless, that branch of the case could have been properly submitted to a jury upon the question whether the decedent had exercised such reasonable care as the exigencies of the situation rendered possible. But when it was once shown that the conditions were such that the decedent, by the exercise of his faculties of sight and hearing, might have averted the disaster, it became necessary ²⁷ for the plaintiff to go a step further and give some affirmative evidence from which a jury could have found that the decedent was free from contributory negligence. She has failed in this particular. There is neither direct nor circumstantial evidence which points either to the presence or absence of contributory negligence on the part of the decedent and the case, therefore, falls within the rule very tersely expressed in *Wiwiowski v. Lake Shore etc. Ry. Co.*, 124 N. Y. 420, 26 N. E. 1023, and *Cordell v. New York Cent. etc. R. R. Co.*, 75 N. Y. 330, as follows: "When the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a refusal to nonsuit is error." Further illustrations of the rule that a plaintiff cannot recover in such an action without some affirmative evidence to show the absence of contributory negligence may be found in *Tolman v. Syracuse etc. R. R. Co.*, 98 N. Y. 198, 50 Am. Rep. 649, *Rodrian v. New York etc. R. R. Co.*, 125 N. Y. 527, 26 N. E. 742, *Reynolds v. New York Cent. etc. R. R. Co.*, 58 N. Y. 248, and *Bond v. Smith*, 113 N. Y. 378, 21 N. E. 128. Our conclusion herein may be briefly summarized in the statement that to permit the submission of such a case as this to a jury upon the question of decedent's contributory negligence would result, not merely in the extension of a rule which has already been stretched to the utmost degree, but in the abrogation of the rule itself.

The order of the appellate division must be reversed, and the judgment of the trial term affirmed, with costs in all courts.

Parker, C. J., Gray, Bartlett, Martin, Vann, and Cullen, JJ., concur.

NEGLIGENCE.—THE BURDEN OF PROOF of negligence as alleged in a petition is upon the plaintiff: *Murray v. Missouri etc. Ry. Co.*, 101 Mo. 236, 20 Am. St. Rep. 601, 13 S. W. 817; *Birming-*

ham etc. Ry. Co. v. Hale, 90 Ala. 8, 24 Am. St. Rep. 748, 8 South. 142. But see the notes to Huey v. Gahlenbeck, 6 Am. St. Rep. 792-795; Long v. Pennsylvania R. R. Co., 30 Am. St. Rep. 736-738. The burden of proving contributory negligence on the part of the plaintiff is generally held to be on the defendant: Alabama R. R. Co. v. Frazier, 93 Ala. 45, 30 Am. St. Rep. 28, 9 South. 303; Little Rock etc. Ry. Co. v. Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50; Pullman etc. Co. v. Adams, 120 Ala. 581, 74 Am. St. Rep. 58, 24 South. 921; though in some jurisdictions the burden is on the plaintiff to show ordinary care on his part: Bartram v. Sharon, 71 Conn. 686, 71 Am. St. Rep. 225, 43 Atl. 143. In West Chicago St. R. R. Co. v. Liderman, 187 Ill. 463, 79 Am. St. Rep. 226, 58 N. E. 367, the doctrine is laid down that in an action to recover damages for negligence, the burden is upon the plaintiff to show not only negligence on the part of the defendant, but also that he himself was not guilty of negligence. In Schmidt v. St. Louis R. R. Co., 149 Mo. 269, 73 Am. St. Rep. 380, 50 S. W. 921, it is said that the burden of proving the defendant's negligence is upon the plaintiff, and the burden of proving the plaintiff's contributory negligence is upon the defendant.

WAEBER v. TALBOT.

[167 N. Y. 48, 60 N. E. 288.]

SALE—WARRANTY OR CONDITION—DESCRIPTION.—Where canned peas are sold by a particular description, the quality being ascertainable by inspection, such description is a part of the contract of sale, a condition precedent to the purchaser's liability, and does not constitute an implied warranty of quality.

SALE—GOODS NOT CORRESPONDING WITH CONTRACT—RIGHT TO RECOVER DAMAGES.—The right of a vendee to recover damages on the ground that the article furnished fails to correspond with the contract does not survive the acceptance of the goods by the vendee after opportunity to ascertain the defect.

SALE.—AN IMPLIED WARRANTY OF THE MERCHANTABILITY of goods survives their acceptance only where the latent defects were not discoverable upon inspection.

SALE—RESCISSION OF CONTRACT.—The right to rescind a contract for the purchase of goods, where they are not as agreed, must be exercised promptly and in good faith.

F. De Lysle Smith, for the appellants.

Robert C. Taylor, for the respondents.

⁵⁰ BARTLETT, J. The plaintiffs were copartners doing a general commission and importing business in foreign and domestic canned goods, etc., in the city of New York, and the ⁵¹ defendants, as partners, were carrying on a general packing and export business in fruits, nuts, vegetables, etc., in the city of Bordeaux, France, in the name of Talbot Freres.

This action was brought to recover damages for the alleged breach of an express warranty on two hundred and seventy-one cases of "Talbot Extra Fine Peas, Sieve 23-24," purchased by Walter Lea, one of the plaintiffs, from the defendants. Walter Lea had, prior to entering plaintiff's firm, purchased from the defendants certain canned peas in cases which they had failed to deliver as per contract; he brought an action against them for damages, which was settled and resulted in a stipulation wherein the defendants agreed to deliver to Lea, on the dock in the city of New York, among other goods, three hundred and thirty-five cases of Talbot peas of a certain description to be contained in decorated tins of the crop of the year 1893. This stipulation was afterward assigned by Lea to the plaintiffs' firm, and the goods therein called for were delivered about the first day of December, 1893, on the dock in the city of New York.

The contest in this case is over two hundred and seventy-one of the three hundred and thirty-five cases therein referred to. This action was originally brought upon an express warranty relating to this shipment of goods of Talbot Extra Fine Peas, Sieve 23-24, one hundred and eighty-three cases at nineteen dollars a case and one hundred and fifty-two cases at twenty-two dollars a case, which it is alleged were sold "to arrive."

On the fifth day of the trial, it having become apparent that no express warranty could be established, the complaint was amended by inserting an allegation that the defendants represented the peas to be merchantable. The trial proceeded for three days more, and at the close of the evidence the defendants moved to dismiss the complaint on various grounds.

The learned trial judge suspended his ruling on this motion until he had submitted to the jury two questions for them to answer specifically: 1. Whether the two hundred and seventy-one cases of peas were merchantable as "Talbot Extra Fine Peas, Sieve 23-24, in decorated tins and of the crop of 1893?"

⁵² To this question the jury answered, "No." 2. What damage did the plaintiffs sustain through the unmerchantability of the said peas? The jury fixed the damages at eleven hundred and seventy-eight dollars and eighty-five cents. Thereupon the trial judge granted the motion to dismiss the complaint, stating in substance that there was no warranty which survived the acceptance of the goods, and that the defendants, by retaining the goods for an unreasonable time, waived their action for damages.

The trial judge further stated that he had required the jury to answer the questions for the purpose of getting into the record facts that would enable the court on appeal to render judgment for the plaintiffs in the event it did not approve the dismissal of the complaint. The appellate division affirmed the judgment of the trial term without dissent.

It is very clear, as held by the courts below, that this was an executory contract without express warranty. The issue presented for trial was a simple one, and rested very largely on undisputed evidence. There is no proof that any express warranty or representations were made at the time of the sale. The goods were generally described as "Talbot Extra Fine Peas, Sieve 23-24." The legal effect of this description lies at the foundation of the case.

It was proved that in the packing factories of France the peas are passed through a revolving sieve containing meshes of different dimensions, and the result is that the product is divided into lots of various sizes.

The smallest size is involved in this action and is the most valuable. It is undisputed that the defendants' firm enjoyed a high reputation in the trade, with factories at Bordeaux, France. It is further established, as might have been claimed by plaintiffs on dismissal of complaint, that the description "Talbot Extra Fine Peas, Sieve 23-24," refers to the highest grade of goods packed by the defendants, being selected, small tender peas.

⁵³ These goods, sold "to arrive," were grown in 1893, and it may fairly be inferred from the evidence that this crop suffered seriously from a severe drouth which prevailed that season in and about Bordeaux.

The peas were placed in tins hermetically sealed, and one hundred of these were packed in each wooden case. It was proved to have been the custom of the trade to examine goods packed in this manner by opening one or more tins in each case, and if this inspection was unsatisfactory, the peas were rejected. The examination of each tin in an entire shipment was impossible, as the opening thereof was destructive of its contents.

The defendants delivered these goods about December 1, 1893, and the plaintiffs learned of the defect in quality some ten days later, but continued to handle and sell them for such prices as they could obtain until some time in the following May, when they offered to return the peas on hand and buy

two cases for every one so paid for by defendants. The appellate division regarded this offer as not made in time and as conditional. This action was begun June 1, 1894.

We come then to consider the controlling question in this case as to the legal effect of the general description contained in the stipulation entered into by the plaintiff Lea and the defendants in settling the original action, to which reference has been made.

The defendants agreed to deliver on the dock in the city of New York a certain number of cases of "Talbot Extra Fine Peas, Sieve 23-24."

This description was well understood between the parties, who were experts in the business, and the quality of the goods called for was not an express or implied warranty, but a part of the contract of sale. The defendants were bound to deliver the quality of goods called for by the contract, which was the highest grade they packed, and, if an inferior article was shipped, the plaintiffs had a reasonable time for inspection, rescission, and offer to return.

⁵⁴ This action does not fall within that class of cases where a dealer sells an article, describing it by a name of commerce, the identity of which is not known to the purchaser and which he cannot ascertain by inspection, and where a warranty is, therefore, implied that the article sold is that described. This class of cases is well illustrated by two leading authorities:

Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136, involved the sale of cabbage seed known as "Van Wycklin's flat Dutch, raised at New Lots, Long Island."

Judge Folger said (69 N. Y. 64, 25 Am. Rep. 136): "It is substantially conceded that the article sold, though seed, and in likeness of that kind of cabbage seed, were in fact totally unproductive of cabbage." This was a situation where inspection by the purchaser afforded him no protection, as the defect in the seed was latent and beyond discovery.

White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13, involved the sale of "Bristol cabbage seed." It was found that cabbages raised from this seed were, in the main, not of the Bristol variety and were of no value, except as food for cattle.

In this case, as in the one last cited, the purchaser could not depend upon inspection, and the law properly holds the seller in such a situation to the implied warranty that the thing delivered is that described in the contract of sale.

The case at bar is not affected by the judicial discussion which has modified to some extent *Seixas v. Woods*, 2 Caines, 48, 2 Am. Dec. 215, and *Swett v. Colgate*, 20 Johns. 196, 11 Am. Dec. 266, and within certain limitations established the rule that the sale of a chattel particularly described imports a contract or warranty that the article sold is of that description. The case of *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595, is cited as a leading one on this point. At page 205 (51 N. Y., 10 Am. Rep. 601), Judge Earl says: "Here there was a positive representation that the article sold was blue vitriol; the plaintiff meant the purchasers to understand that it was blue vitriol, and he sold it as such. The defendant relied upon the representation, believing it to be blue vitriol, and bought it as such. If upon these facts the court was not authorized to hold as matter of law that there was a warranty, it was at least bound to submit the question of warranty to the jury."

⁵⁵ This case went off on the point that the representations amounted to a warranty, or could be so found by the jury; this is all that was decided. The case of *Dounce v. Dow*, 64 N. Y. 411, is also cited. The defendant ordered of plaintiff iron known as "XX pipe iron" to be used in manufacture of farming implements which required soft, tough iron. It proved to be brittle and unfit. The court held that the plaintiff warranted the character of the iron as "XX pipe iron," but not any certain quality of that brand. If defendant desired this he should have exacted an express warranty.

It was further held that if a warranty that the iron was merchantable could be implied, the defendant, by using a large portion of it after an opportunity to examine and ascertain the quality, must be deemed to have accepted it and waived the warranty. The facts in this case clearly distinguish it from the case at bar.

In the case cited, the words "pipe iron" referred to the furnace where manufactured, and "XX" to the brand, indicating the quality. All that the implied warranty covered was iron of this make and brand, but not as to any certain quality of the brand.

In the case before us we have experts in the same business, meeting on an equal footing, the one agreeing to sell and the other to purchase a certain brand of goods, not then in existence, as the pea crop was at that time, March, 1893, in the ground. The seller and the buyer had been familiar with this brand of goods for years.

The quantity and brand of goods, judged by external appearances, were delivered according to the contract, which required them to be of a precise and definite quality. Inspection alone could determine whether the defendants had performed their contract. The plaintiffs, within ten days after receiving the goods, were advised that there was trouble as to their quality.

It then became their duty to act with reasonable promptness, inspect the entire consignment in the manner allowed by the custom of the trade, and, if it proved unsatisfactory, to rescind the contract and offer to return the goods.

⁵⁶ In *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422, when this point of quality of goods being a part of the contract was under discussion, attention was called by Judge O'Brien to the fact that the sale of a particular thing by terms of description has been treated as a warranty in many modern cases, but that there are numerous authorities in which such words of description (149 N. Y. 147, 43 N. E. 425) "are not considered as a warranty at all; but conditions precedent to any obligation on the part of the vendee, since the existence of the qualities indicated by the descriptive words, being part of the description of the thing sold, become essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted: *Smith's Leading Cases*, 6th Eng. ed., 27; 2 *Schouler on Personal Property*, 352, 353. The tendency of the recent decisions in this court is to treat such words as part of the contract of sale descriptive of the article sold and to be delivered in the future, and not as constituting that collateral obligation which sometimes accompanies a contract of sale and known as a warranty: *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 236, 15 N. E. 335."

The point under discussion was considered long since in England. Mr. Benjamin, in his work on Sales, seventh edition, at section 600, says: "When the vendor sells an article by a particular description, it is a condition precedent to his right of action that the thing which he offers to deliver, or has delivered, should answer the description. Lord Abinger protested against the confusion which arises from the prevalent habit of treating such cases as a warranty, saying: 'A good deal of confusion has arisen in many of the cases upon this subject from the unfortunate use made of the word "warranty."' Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall

be a part of a contract, and, though part of the contract, collateral to the express object of it; but in many of the cases the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach ⁵⁷ of warranty; but it would be better to distinguish such cases as a noncompliance with a contract which a party has engaged to fulfill, etc.' : *Chanter v. Hopkins*, 4 Mees. & W. 399." Mr. Benjamin, after quoting as above, says: "There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability; and if this condition be not performed, the purchaser is entitled to reject the article, or, if he has paid for it, to recover the price as money had and received for his use."

Treating the general description in the case before us as a part of the contract of sale, the plaintiffs were abundantly protected, and, if they failed to inspect, rescind, and return the goods, it is because they neglected to avail themselves of the remedies which the law afforded them.

In cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages on the ground that the article furnished fails to correspond with the contract, does not survive the acceptance of the property by the vendee after opportunity to ascertain the defect: *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *McCormick v. Sarson*, 45 N. Y. 265, 6 Am. Rep. 80; *Beck v. Sheldon*, 48 N. Y. 373; *Dutchess Co. v. Harding*, 49 N. Y. 321; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335; *Mason v. Smith*, 130 N. Y. 474, 29 N. E. 749.

The learned counsel for the appellants argues that, assuming there was no express warranty, his clients are protected by the implied warranty which arises in the case of the manufacturer of goods.

It is claimed the person who cans fruit and vegetables for the market, buying the same from various growers, stands in the position of a manufacturer of goods when he sells those products to the jobber.

Assuming, without deciding, this point in favor of the appellants, it is enough to say that this court has held that the manufacturer's implied warranty of merchantability only ⁵⁸ survives the acceptance of the goods if the latent defects were

not discoverable upon inspection: *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636, 45 N. E. 856.

In the case at bar, as already pointed out, there was a mode of inspection well known to the trade, under which any imperfection of the peas, or the liquid in which they were preserved, was readily discoverable. An inspection of two or three samples in each case of a hundred tins warranted the rejection of the entire case.

These goods were delivered by the defendants December 1, 1893, and the plaintiffs were advised of the defect in their quality ten days later. The offer by the plaintiffs to return such goods as they had on hand in the following May, on the eve of bringing this action, was not in time, even assuming, without deciding, that the offer was unconditional. The cases cited, and numerous others, to which reference might be made, hold that the right to rescind a contract, where goods are not as agreed, must be exercised promptly and in good faith.

The views we have expressed render it unnecessary to examine the appellants' exceptions.

The judgment of the appellate division should be affirmed, with costs.

Parker, C. J., Gray, Martin, Vann, Cullen and Werner, JJ., concur.

SALE—DAMAGES.—A VENDEE CANNOT ACCEPT delivery of property under an executory contract of sale, retain it after having an opportunity of ascertaining its quality, and recover damages if it is not of the quality or description called for by the contract: *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305. See, too, *Hoadley v. House*, 82 Vt. 179, 76 Am. Dec. 167. But the right to recover for the breach of an express warranty of quality survives the acceptance of the goods by the vendee: *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753, 23 N. E. 372; *Morse v. Moore*, 83 Me. 473, 23 Am. St. Rep. 783, 22 Atl. 362; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 26 Am. St. Rep. 890, 27 Pac. 454; and a purchaser does not waive an implied warranty in his favor if a defect exists in goods which is not discoverable upon inspection: *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 635, 45 N. E. 856.

SALE—IMPLIED WARRANTY.—A seller is not answerable for the quality of an article that has been inspected and received by the buyer, provided it is in specie the thing for which it has been sold: *Jennings v. Gratz*, 3 Rawle, 168, 23 Am. Dec. 111. Compare *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560.

GRAY v. RICHMOND BICYCLE COMPANY.

[167 N. Y. 348, 60 N. E. 663.]

JUDGMENTS—MERGER—SISTER STATE.—A judgment of a court in any state is a merger of the cause of action in every part of the Union.

JUDGMENTS—FRAUDULENT—QUESTION FOR JURY.—Where the nonresident payees of promissory notes are, through the misstatement of some material facts and the suppression of others, relative to the safety of such a course and the sufficiency of the maker's assets, induced to place such notes in the hands of attorneys recommended by the maker so that judgment could be taken upon them, under the terms of a mortgage, given to the payees without their knowledge or consent, which would be a ratification of the mortgage, the question whether a judgment upon such notes was procured by fraud or not is a question for the jury.

JUDGMENT OF SISTER STATE—ENJOINING ENFORCEMENT OF FOR FRAUD.—A court of one state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state.

JUDGMENTS — RATIFICATION — LACHES — QUESTION FOR JURY.—Whether a party to a judgment has ratified it or has been so guilty of laches that he is precluded from bringing suit to enjoin its enforcement is a question of fact to be determined by the jury under all the circumstances of the case.

Payson Merrill, for the appellant.

John S. Melcher, for the respondent.

⁶⁵⁴ VANN, J. A cause of action is merged in a judgment rendered upon it, not only for the reason that a judgment is of a higher nature, but because it would be vexatious to the one party and of no benefit to the other to permit the recovery of two judgments against the same person for one debt: *Davies v. Mayor etc.*, 93 N. Y. 250, 254; *Nicholl v. Mason*, 21 Wend. 339; *Wayman v. Cochrane*, 35 Ill. 152; *Hogg v. Charlton*, 25 Pa. St. 200; *Marshall v. Stewart*, 65 Ind. 243; *Freeman on Judgments*, sec. 215; 15 Am. & Eng. Ency. of Law, 1st ed., 336. As a ³⁵⁵ judgment of a court in any state is entitled to full faith and credit in the courts of all the states, it is a merger of the cause of action in every part of the Union: *Besley v. Palmer*, 1 Hill, 482; *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnel*, 3 Wheat. 232.

The judgment of the circuit court of Indiana, rendered upon the promissory note in suit, is, therefore, a bar to this action, unless the plaintiff made out a case of fraud in securing juris-

diction of his assignor, sufficient for the consideration of the jury. He insists that the appearance of Jackson & Starr as attorneys for Allerton-Clarke Company was procured by fraud, and, consequently, that the Indiana court had no jurisdiction of that corporation. He further insists that, as such appearance was procured by the fraud of the defendant in this action, it is estopped from invoking the judgment thus recovered by it as a bar. The defendant expressly admits that "even a foreign judgment may be successfully assailed for fraud in its procurement." As both parties concede that a judgment, recovered in a sister state through the fraud of one party in procuring the appearance of another, is not binding on the latter when an attempt is made to enforce such judgment in this state, we shall proceed without further discussion to consider the question whether the evidence would have authorized the jury to find the defendant guilty of fraud in the premises: *Davis v. Cornue*, 151 N. Y. 172, 45 N. E. 449; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Freeman on Judgments*, 4th ed., sec. 576; *Black on Judgments*, sec. 903.

At the commencement of the correspondence between the parties the relation of debtor and creditor existed between them, and the defendant, as debtor, had given a mortgage to Allerton-Clarke Company, as the creditor, without its knowledge or consent. That mortgage, and another ahead of it, covered all the property of the mortgagor, worth about twenty thousand dollars, and the claim of Allerton-Clarke Company, the mortgagee standing last upon the list of those purporting to be secured, was subject to prior claims amounting to twenty-four thousand dollars. As Allerton-Clarke Company stood a poor chance of collecting their debt ³⁵⁶ except by attacking the mortgage, the defendant may have had an object in inducing them to take judgment and thereby to ratify the mortgage. It may have intended that they should become bound by it and unable to overturn it upon the ground of fraud, of which there was some evidence. Moreover, the defendant had property in this state which might be attached here, with danger of loss to the defendant and its friends in Indiana, unless the New York creditors could be induced to come in under the mortgage. The parties did business in different states and were so widely separated from each other that Allerton-Clarke Company knew nothing of what had been done until they were informed by the defendant. While the defendant was not legally bound to speak at all, it was bound, if it did speak, to take no advantage,

either by misrepresentation or concealment. If it broke silence, the circumstances required the utmost candor in every statement. It spoke through Mr. Wilson, its president, who had executed the mortgages for the defendant and knew all the facts. Under these circumstances, whatever he wrote in relation to the situation was the act of the defendant, and the rule of *uberrima fides* applied to every statement made and every fact withheld. He could not mislead the creditors, nor willfully cause them to act on what they believed were the facts, when he knew they so believed, but also knew the facts to be materially different. While the law did not make it his duty to write, it required him to exercise the utmost good faith, and to make a full and fair disclosure when he volunteered to write.

He wrote, apparently, to induce Allerton-Clarke Company to place their notes in the hands of certain attorneys recommended by him, so that judgment could be taken upon them, which would be a ratification of the mortgage, as their claims were not due except by virtue of its provisions. Either with or without a furtive intent he made one material misstatement and suppressed three material facts. He stated that the assets of the defendant were ample to pay all the preferred claims, and omitted to state that the mortgage to Allerton-Clarke ³⁵⁷ Company was second to that of the Second National Bank for thirteen thousand dollars, given at the same time; that it could get no advantage from the mortgage until all the other mortgagees, whose claims amounted to twenty-four thousand dollars, were paid in full, and that the attorneys recommended were acting for the Second National Bank, the party that would derive the greatest benefit from a ratification of the mortgage. The misstatement, the omissions and the surrounding circumstances should be considered together, for facts of trifling importance when considered separately may afford clear evidence of fraud when considered in connection with each other. While the expression in the first letter, "you will find that the property will be ample to pay the notes," may have been intended simply as an opinion, it may have been intended to divert attention and prevent inquiry. This is true of a similar expression in the second letter, although it assumed the form of a statement of fact, viz.: "The assets are ample to pay all of these preferred claims." While, according to the general rule, no one is liable for the expression of an opinion, "this is true only when the opinion stands by itself," for "it may be so expressed as to bind the person making it to its truth, whether it take the form of

an opinion or not": Hickey v. Morrell, 102 N. Y. 454, 463, 55 Am. Rep. 824, 7 N. E. 321. The opinion which was evidently intended to induce action by Allerton-Clarke Company, does not stand alone in this case, for it must be considered in connection with the suppression of the three facts above mentioned. Those facts may have been withheld either by accident or design, and it is not for the court to decide whether the purpose was honest or dishonest. Good faith required the writer not to take advantage of his correspondent, and he may have acted with or without an intent to deceive; it was for the jury to say. It may have been simply the unintentional omission of one writing in a hurry to state all the facts, or it may have been done willfully with a deceitful purpose to cause Allerton-Clarke Company to believe what was not true, and to act under a fraudulent concealment of the actual state of affairs.

358 After assuring Allerton-Clarke Company that they were secured, that the assets were ample to pay the mortgages, and that "we will see that you are protected," it is a suggestive omission that no allusion is made to the large mortgage. So, after stating that "your claim, along with" the four others named, is secured by a mortgage, it is significant that there is a failure to state that such claim was subordinate to all the others. The statement in the first letter that the mortgage covered all the property and was ample to pay "these notes," and in the second to pay "these preferred claims," with no mention of the large mortgage ahead of these notes and claims, tended to mislead. The assertion of certain material facts in connection with an assurance of safety might well be regarded as a declaration that no other material fact existed. A telegram conferring authority for an appearance by attorneys was requested instead of a letter, and this tended to prevent investigation. Mr. Wilson may have realized, when writing a letter calling for immediate action in order to avoid the loss of a benefit purporting to have been conferred, that the undisclosed facts, if known to Allerton-Clarke Company, might induce them to refuse to act as requested, or to thus ratify the mortgage. If so, it became his duty to speak, yet he remained silent, and the jury might properly have found that his silence was part of a scheme to defraud.

Evidence was given tending to show that the Indiana judgment was entered September 29th, and if so, the letter of September 30th from Jackson & Starr, that judgment was ready for entry on receipt of the notes, which were never forwarded,

was misleading; and if, as other evidence tended to show, the judgment was entered October 4th, and not until after the receipt of the letter of October 2d, which virtually stayed proceedings until the receipt of further information, the judgment was entered without authority. After writing that letter, Allerton-Clarke Company had a right to believe that no further proceedings could be taken without further instructions. The facts relating to fraud and the want of authority permitted diverse inferences. The intent with which the letters ²⁵⁰ were written was a question of fact, for the circumstances warranted a finding of guilt or innocence. If they were written with a fraudulent intent, the judgment was no bar, but if they were written with an innocent purpose, it is a conclusive defense. Questions of fraud, above all others, are for the jury, and we think it was error for the trial court to withdraw the case from them, because there is a foundation in the evidence for a conclusion either way that would not shock the sense of a reasonable man: *Bagley v. Bowe*, 105 N. Y. 171, 179, 59 Am. Rep. 488, 11 N. E. 386; *Smith v. Coe*, 55 N. Y. 678.

It was not necessary for the plaintiff to go into the state of Indiana and obtain relief from the judgment through its courts, for, as we have held, "a court of one state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject matter is situated in such other state": *Davis v. Cornue*, 151 N. Y. 172, 179, 45 N. E. 449. The assertion of the foreign judgment as a bar in this action was an attempt to enforce it indirectly, and it was the duty of the trial court to send the case to the jury with the instruction that if they found the judgment was procured by fraud, it could not be asserted as a bar in this state.

We are also of the opinion that it was a question of fact whether Allerton-Clarke Company ratified the judgment or were guilty of laches. They knew some facts and had an opportunity to know more, but whether they discovered, or should have discovered, enough to bind them or to require them to make some disclaimer before commencing this action, was for the jury, under all the circumstances, to determine. As the whole case was for the jury, the judgment should be reversed and a new trial granted, with costs to abide the event.

Parker, C. J., O'Brien, Bartlett, Martin, Landon, and Cullen, JJ., concur.

A JUDGMENT OF A SISTER STATE is impeachable for fraud or want of jurisdiction: *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Welch v. Sykes*, 3 Gilm. 197, 44 Am. Dec. 689; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129.

MERGER.—A JUDGMENT OF A SISTER STATE has the same effect as a domestic judgment, and is therefore a merger of the original cause of action: *Baxley v. Linah*, 16 Pa. St. 241, 55 Am. Dec. 494; *West Feliciana R. R. Co. v. Thornton*, 12 La. Ann. 736, 68 Am. Dec. 778. See, also, *Evans v. Cleary*, 125 Pa. St. 204, 11 Am. St. Rep. 886, 17 Atl. 440; contra, *Eastern Tp. Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665.

CARR v. NATIONAL BANK AND LOAN COMPANY.

[167 N. Y. 375, 60 N. E. 649.]

AGENT ACTING FOR BOTH PARTIES.—Where a plaintiff becomes a purchaser from the defendant through an agent, who, without the plaintiff's knowledge, acts also as the agent of the defendant, equity will avoid the transaction without reference to any actual fraud on the part of the defendant or of the agent, there being such fraud in law as to make the contract a voidable one at the election of the plaintiff.

NATIONAL BANK—PRESIDENT.—The equitable rule, which forbids a principal from reaping any benefit from the wrongful act of his agent, applies to a national bank, whose president, in excess of the powers of the bank, sells securities to one who did not know that she was dealing with the bank through its president.

Action to rescind a transaction, in which bonds belonging to the defendant were sold to the plaintiff. Plaintiff came into the possession of moneys which Sherman, the president of the defendant bank, induced her to allow him to invest, he representing that he could do so in safe securities. He purchased bonds and paid her money to the bank. Sherman acted as the personal friend of the plaintiff, who knew nothing of the bonds or their ownership. Sherman misrepresented to the plaintiff the character of the bonds and the nature of the investment. Plaintiff, upon discovering such misrepresentations and the interest of the defendant in the matter, tendered all the bonds to it, and demanded their face value with interest. Judgment for the plaintiff.

John Lansing, for the appellant.

Elon R. Brown, for the respondent.

378 GRAY, J. The unanimous affirmance by the appellate division of the judgment, which was awarded to the plaintiff

by the trial court, conclusively establishes all the foregoing facts, and the legal question is whether they warranted the conclusion ³⁷⁹ that the plaintiff was entitled to disaffirm the sales of the bonds to her. The appellant argues that the facts did not establish any actual fraud on the part of the defendant. But that was not essential to the granting of the relief which plaintiff demanded. There was shown to have been such a condition of things, in the situation of the parties and in the ignorance in which the plaintiff was kept of material facts, by ways of suppression, or of misrepresentation, as, in equity, to warrant her in wholly repudiating the transaction. It is quite immaterial that there may have been no intention to actually defraud: *Hammond v. Pennock*, 61 N. Y. 145. The plaintiff supposed that she had enlisted the disinterested services of Sherman in the investment of her moneys, and, relying upon what he told her, confided them to him; whereas, in fact, he was acting for the bank, of which he was president and manager, in disposing, at a profit, of a series of securities, which it had acquired. He was acting for the defendant as a seller of the bonds and for the plaintiff as an intending purchaser, and a fraudulent motive was not necessary to be proved, either on the defendant's part, or on that of the common agent, for in the view of a court of equity, there was such fraud in law as to make the contract a voidable one, at the election of the plaintiff. The plaintiff has been made to suffer her loss through misplaced confidence in one whom she believed to be devoted to her interests, while, at the time, he was acting for the defendant's, and the legal theory of her right to equitable relief, by the way of rescission, rests upon the basis that Sherman undertook to act as the agent of both parties in a matter where their interests were, for obvious reasons, to be regarded as conflicting. In such cases equity will, upon the seasonable application of a party, avoid the transaction, and this right is conceded, without reference to any actual fraud. A binding transaction requires the free and conscious action of the party's mind upon its subject. The general equitable doctrine should be regarded as well settled: *Story on Agency*, sec. 31; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *New York Cent. Ins. Co. v. National etc. Ins. Co.*, 14 N. Y. 85; *Conkey v. Bond*, 36 N. Y. 427; *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553; *Empire State Ins. Co. v. American Cent. Ins. Co.*, 138 N. Y. 446, 34 N. E. 200. There is no question but that plaintiff acted promptly upon her

discovery of how Sherman had acted, in tendering back at once the bonds to the defendant, in disaffirmance of the transaction.

The appellant argues that what Sherman did was his individual act, for which it should not be held responsible; and, further, that as it could not, being a national bank, engage in the business of buying and selling securities, its officers could not subject it to any liability by reason of such transactions. It is sufficient to say, in answer to that objection, that the plaintiff did not know that she was dealing with the defendant through Sherman as one of its officers, and that, whatever the limitations upon its powers, they cannot interfere with the just operation of the rule in equity which forbids a principal from reaping any benefit from the wrongful act of his agent: *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75. No such extraordinary immunity was conferred upon national banks. Then, it is to be observed that the effect of the plaintiff's action is, simply, by avoiding the whole transaction into which she was falsely led by defendant's agent, to place the parties in the same position as they were in before it occurred.

The question of ultra vires, which defendant raises, has no place in the case. The plaintiff did not know the defendant in the transaction, and she is not seeking to avail herself of anything that Sherman did for it. She asks to be restored to the possession of her property, of which she was unfairly deprived to the defendant's advantage, through its agent's misconduct, and upon the plainest principles of equity she was entitled to her judgment.

The judgment should be affirmed, with costs.

Parker, C. J., Bartlett, Haight, Martin, Vann, and Werner, JJ., concur.

AGENT ACTING FOR BOTH PARTIES.—An agent cannot act for both his principal and the adverse party in a transaction, unless by the consent of his principal: *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338, 48 Am. St. Rep. 558, 17 South. 282. An agreement to act as agent for both parties to a transaction requires the consent of both principals, otherwise it is void: *Ramspeck v. Pattillo*, 104 Ga. 772, 69 Am. St. Rep. 197, 80 S. E. 982.

ACKERMAN v. RUBENS.

[167 N. Y. 405, 60 N. E. 750.]

SALE—FAILURE TO COMPLETE—VENDOR'S REMEDIES.—When the vendee of personal property, under an executory contract of sale, refuses to complete his purchase, the vendor may keep the article for him and sue for the entire purchase price; or he may keep the property as his own and sue for the difference between the market value and the contract price; or he may sell the property for the highest sum he can get, and, after crediting the net amount received, sue for the balance of the purchase money.

SALE TO ONE'S SELF—PUBLIC AUCTION—EVIDENCE OF VALUE OF PROPERTY.—A vendor of personal property, upon the vendee's refusal to complete his purchase may sell the property for the highest sum he can get, and sue for the balance of the purchase money; and where the vendor himself purchases the property at public auction sale fairly conducted upon notice to the vendee, with no suspicion of fraud or undue advantage, the amount paid is legal evidence of the value of the property, and the direction of a verdict for nominal damages only is reversible error.

Charles D. Ridgway, for the appellant.

Percival S. Jones and Henry J. McCormick, for the respondent.

408 VANN, J. When the vendee of personal property, under an executory contract of sale, refuses to complete his purchase, the vendor may keep the article for him and sue for the entire purchase price; or he may keep the property as his own and sue for the difference between the market value and the contract price; or he may sell the property for the highest sum he can get, and, after crediting the net amount received, sue for the balance of the purchase money: *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271; *Dustan v. McAndrew*, 44 N. Y. 72.

While the courts below recognized this rule they did not apply it, for they held that the sale at auction was no sale at all, because a man cannot sell to himself. This would be true of an attempt to make a private sale to one's self, but it is not true of a sale at public auction, fairly conducted by a licensed auctioneer, and made at a reasonable time and place, after adequate opportunity to see the property, due advertisement to the public and personal notice to the vendee, when the real purpose is to ascertain the value of the property. The law is satisfied with a fair sale, made in good faith, according

to established business methods, with no attempt to take advantage of the vendee. Such as the jury might have found was the sale under consideration. The primary object of the sale was not to pass title from the vendor, but to lessen the loss of the vendee. The subject of the sale had no market value, and the amount for which it could be sold depended largely upon taste and fancy. A public competitive sale by outcry to the highest bidder, duly advertised and made upon ⁴⁰⁰ notice to the vendee, is a safer method of measuring the damages than a sale by private negotiation, which has been held sufficient: *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415. A fair public sale, in the absence of other evidence, is competent evidence of value. The plaintiff did not conduct the sale himself, but placed the yacht in the hands of a public auctioneer for sale without reservation, on account of whom it might concern. While the auctioneer was his agent he could not lawfully control him so as to prevent an honest sale. The defendant had notice and an opportunity to protect himself, yet he asked for no postponement, made no request, gave no instructions and did not even appear at the sale. If the plaintiff's agent had refrained from bidding, the property would have gone to a stranger for a less sum than it finally brought, and yet, in that event, even according to the defendant's theory, the sale would have been valid. The fact that the plaintiff outbid all competitors did not render the sale invalid, for he had a right to bid, provided he took no advantage by trying to prevent others from bidding or by disregarding any reasonable request of the defendant, or in any other way. If he had acted as auctioneer, or in collusion with the auctioneer, or there was any evidence of furtive effort on his part, or anything to challenge the fairness of the sale, the action of the trial court in virtually withdrawing the case from the jury might have been justified, but the mere fact that he was the highest bidder at a public sale, the fairness of which is not questioned in any other respect, did not warrant the direction for nominal damages only. The object of the sale was to measure the damages caused by the default of the defendant, and they were diminished instead of being increased by the action of the plaintiff.

We forbear further discussion, because the question is no longer open in this court, as it was involved in a case recently decided by us upon careful consideration after full discussion by counsel: *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692,

50 N. E. 271. In that case, as in this, the property was sold at auction to a representative of the vendor, and the point was distinctly made on the argument ⁴¹⁰ before us that as the vendor was the real purchaser, "the sale was colorable only and absolutely without effect upon the rights of the parties." While we did not discuss the question in our opinion, it was necessarily involved, was passed upon in consultation, and decided. Both upon principle and authority we think that the amount for which the yacht was struck off to the vendor at an auction sale fairly conducted, upon notice to the vendee, with no suspicion of fraud or undue advantage, was lawful evidence of the value of the yacht and presented a case for the consideration of the jury. The judgment should, therefore, be reversed and a new trial granted, with costs to abide the event.

Parker, C. J., Bartlett and Martin, JJ., concur.

HAIGHT J., with whom concurred Gray and Werner, JJ., dissented on the ground that the vendor could not sell to himself. "Selling as agent," said Judge Haight, "he cannot sell to himself. Selling involves contracting, and a person cannot contract with himself and bind others thereby. If he could sell to himself publicly he could privately, and thus be able to perpetrate a fraud or an injustice which might be difficult to detect or prove: *Van Brocklen v. Smeallie*, 140 N. Y. 70, 75, 35 N. E. 415; *Pollen v. Le Roy*, 30 N. Y. 549, 557; *Dustan v. McAndrews*, 44 N. Y. 78; *Hayden v. Dernets*, 53 N. Y. 426; *Bain v. Brown*, 56 N. Y. 285. . . . In this case the sale was made by the seller to himself. It was made through the agency of an auctioneer, it is true, but the auctioneer was his agent and represented him in the transaction." The dissenting opinion considered that the question presented here was neither raised nor involved in the case of *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271.

SALE—REMEDIES OF VENDOR.—A vendor of personal property, when the vendee declines to take and pay for it, ordinarily has the choice of any of three methods of indemnifying himself from loss: 1. He may store or retain the property for the vendee and sue him for the entire price; 2. He may sell the property and recover the difference between the contract price and the price obtained on the resale; or 3. He may keep the property as his own and recover the difference between the market value at the time and place of delivery and the contract price: *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271. The relation between the parties and the duty of the vendor, in case he elects to make a resale, are discussed in *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. Rep. 727, 13 S. W. 527; *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271; *Grist v. Williams*, 111 N. C. 53, 32 Am. St. Rep. 782, 15 S. E. 889; *Rosenbaum v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737.

BRACKEN v. ATLANTIC TRUST COMPANY.

[167 N. Y. 510, 60 N. E. 772.]

JUDGMENT—FORMER ADJUDICATION—DECREE IN EQUITY A BAR TO ACTION AT LAW.—A decree rendered in a suit in equity brought by a trustee at the request of bondholders against a trust company, in whose hands stock had been deposited as security for the guaranty of bonds, to enforce the obligation of the trust company to deliver over the stock, or the proceeds of its sale, for the satisfaction of an amount remaining due upon the bonds, constitutes an estoppel against the right of a bondholder to sue for damages which he has suffered by reason of the retention of the stock by the trust company until the termination of the litigation.

JUDGMENT—MERGER—LEGAL RIGHTS MERGED IN DECREE IN EQUITY.—Where, upon the refusal of a trust company to deliver stock, or the proceeds of its sale, in compliance with its agreement, a right of action accrues to bondholders and their trustee to sue either in equity to enforce the obligation, or at law to recover damages, a suit in equity by the trustee for the bondholders and the recovery of judgment therein preclude any subsequent action for damages by the bondholders, their legal rights being merged in such judgment.

CAUSE OF ACTION—WHEN NOT ARISE—DEPRECIATION DURING LITIGATION.—Where the delays of litigation have caused a loss by the depreciation in the market value of the stock for the recovery of which suit has been brought, such loss is a hazard or an indirect result of the litigation, and does not give rise to a new or separate cause of action.

CAUSE OF ACTION—DEPRECIATION PENDING APPEAL.—Where the depreciation in the value of stock sued for occurs after judgment has been rendered and pending the appeal of the defendant, there is no new or illegal detention of the stock which will give rise to a new cause of action, but there is simply a continuation of the original wrong which was sued upon, especially where the plaintiff took no steps to enforce his judgment.

Action to recover damages of the defendant for its neglect of duty owing to the plaintiff as the holder of certain bonds. These bonds were secured by a mortgage to the Mercantile Trust Company, as trustee. The payment of these bonds was guaranteed by the United Electric Traction Company, and to secure the performance of this guaranty, stock was deposited with the defendant. Upon the foreclosure of the mortgage a large deficiency resulted, and the Mercantile Trust Company demanded of the defendant either the stock deposited with it as security or the proceeds of the stock. Other facts are sufficiently stated in the opinion.

William B. Hornblower, Howard A. Taylor, and George J. Peet, for the appellants.

Henry L. Stimson, Thomas Thacher, and Alfred B. Thacher, for the respondent.

515 GRAY, J. The direction of the verdict at the trial term in favor of the respondent, the Atlantic Trust Company, was made in pursuance of a prior determination by the appellate division, which reversed a judgment recovered by the plaintiff. The appellate division had held, upon what was the main question in the case, that the bondholders were bound by the judgment which their trustee, the Mercantile Trust Company, had obtained, in 1895, and were privy to it; that the effect must be the same as though the previous action had been brought in the names of the bondholders, and that the recovery of the judgment constituted an estoppel against the right of this plaintiff to maintain an action for any damages which he suffered, by reason of the retention of the stock by the Atlantic Trust Company until the termination of the litigation. I think the case has been correctly decided. The action cannot be maintained. It rests upon the facts which existed at the time of the trial of the trustee's action, and, in order to make out his case, the plaintiff was only obliged to make proof of the additional material fact of the depreciation in the value of the securities between the time of his trustee's demand upon the Atlantic Trust Company and the time when the securities were delivered up. The former action was of an equitable nature and the plaintiff therein, as trustee, represented this plaintiff and all the other bondholders in all their rights and demands. The court acquired such jurisdiction as empowered it to render any judgment which would determine all questions within the purview of the suit, and such a one as that of damages occasioned by delay in 516 performance, or other default in any duty owing to the plaintiff, under the circumstances, would be incidental to, and flow from, the proper equitable relief: Story's Equity Jurisprudence, sec. 796. The trustee's action had for its object the delivery of the stock held by the Atlantic Trust Company and its sale, for the purpose of applying the proceeds to meet the deficiency arising upon the foreclosure sale, within the contract of guaranty, and it cannot well be doubted but that the equitable jurisdiction of the court would have authorized it to award any damages provable against the defendant under the circumstances shown. The principle was asserted by the English court of appeal in *Serrao v. Noel*, L. R. 15 Q. B. Div. 549, where

the defendant was sued for damages for the unlawful detention of shares of stock, the delivery of which had been theretofore decreed in an action brought by the same plaintiff in the chancery division of the court. When the shares were finally delivered, they had so declined in value as, upon their sale, to bring a considerable loss to the plaintiff, and it was sought, in the second action, to make the defendant liable in damages.

The defendant pleaded by way of estoppel the previous chancery decree, and this defense was held to be good by all of the justices of the court of appeal. The principle of the decision, in the language of Lord Justice Bowen, was that "the suit in the chancery division was an application to the high court of justice for all kinds of relief in order that the rights of the parties might be adjusted."

The precise question here is, whether the plaintiff's trustee, in pursuing its remedy to enforce a delivery of the stock, or its sale, has not so dealt with the subject of the controversy with the Atlantic Trust Company as to preclude the bondholders from setting up the present claim, based upon the alleged wrongful act of that company in not applying the stock, held by it as security for the guaranty of the bonds, to the satisfaction of the amount remaining due upon the bonds, when demanded of it. In effect, the stock had been deposited with the Atlantic Trust Company by the guarantor of the bonds, as security for the performance of the guaranty, and the ⁵¹⁷undertaking of the depositary was to hold the stock for that purpose. When the time arrived for the application of the security to its purpose, the depositary, whether its duty be regarded in the light of a trust, or of a contract, was bound to deliver over either the stock, or the proceeds of its sale, to the trustee for the bondholders. When it refused to comply with the latter's demand to do the one or the other thing, there was a definite breach of its obligation and the trustee for the bondholders had the election to pursue either of two remedies. Their trustee could pursue the remedy by action on the equity side of the court to enforce the obligation to deliver over the stock, for its sale and application; or it could treat the refusal of the depositary to deliver the stock as a breach of its contract and sue at law for damages. The trustee had a lien upon the stock for the benefit of the bondholders. The defendant had recognized a right in the trustee to the stock in a certain contingency and its subsequent refusal to deliver it, if wrong-

ful, amounted to a conversion of the bondholders' security, which gave to their trustee the right to recover its market value at the time. The cause of action in either case would be the same; for its establishment, notwithstanding the difference in form of action, would depend upon the same evidence: *Stowell v. Chamberlain*, 60 N. Y. 272. In electing to pursue the former remedy, the bondholders and their trustee were concluded from prosecuting a second action for damages. They could not treat the obligation as subsisting and sue to enforce its performance, and then subsequently, after obtaining the fruits of a decree, sue the same defendant for the recovery of damages, upon the theory that there had been a neglect of duty, or a breach of the obligation.

But it is clear that in the former equitable action full relief could have been granted, such as was consistent with the cause of action; even if, for the purpose of a recovery of damages, an amendment of the pleadings became necessary. The action was in equity; for it sought the enforcement by judicial decree of an asserted right to the stock. As it was observed below, it aimed at the same relief, which might have been⁵¹⁸ obtained had the plaintiff's title been such as to enable it to maintain replevin for the stock. But, within the rule of either action, damages were recoverable for delay in performance, or for unlawful detention of the property. In my opinion, the plaintiff's legal rights were resumed in the former action brought by his trustee and were merged in the judgment therein recovered.

In *Phelps v. Prothero*, 7 De Gex, M. & G: 722, where there had been a decree for specific performance, and subsequently a judgment at law was obtained for damages growing out of the same contract, the enforcement of which was restrained by injunction, it was said by Lord Justice Turner that "the defendant had originally the right to proceed either at law for breach of the agreement, or in this court for the specific performance of it. He adopted the latter remedy. I think that a plaintiff who has legal rights and comes to this court for its aid is bound to put his legal rights under the control of the court."

The whole theory of the former action by the trustee for the bondholders seems inconsistent with the present claim to recover damages for the failure of the defendant to deliver over the stock, or to apply the proceeds of its sale. By that action the Mercantile Trust Company, for the bondholders,

submitted the whole question to the court, as to the Atlantic Trust Company's obligation with respect to the security. The latter set up adverse claims, or liens, and, upon the issue raised, the whole controversy was thrown into court. The delays of the litigation caused, as it is claimed, a loss by the depreciation in the market value of the security; but where was the injury which the law would recognize as giving rise to a claim for damages? That was a hazard, or an indirect result, of the litigation. It was not one which could be deemed to have been within the contemplation of the parties; for, in legal presumption, the judgment demanded would comprehend complete redress in its execution.

There was the one wrong, if any, committed by the Atlantic Trust Company and that was in its refusal to comply with the ⁵¹⁹ demand of the bondholders' trustee for the stock, or for the proceeds of its immediate sale. For that wrong the former action was brought and its redress was to be had in the judgment which should be awarded. If delays were caused by litigation, and loss resulted to the bondholders from a depreciation in the market value of the security intended for their benefit, I cannot see how a new or separate cause of action has arisen.

In that respect the case of *Commerce Exchange Nat. Bank v. Blye*, 123 N. Y. 132, 25 N. E. 208, is of some application. There the plaintiff claimed the possession of certain bonds, as having a special property therein, which had come into the defendant's hands as receiver, and, upon the latter's refusal to deliver them up, the action was brought for their possession and damages were asked for their detention. The action was defended upon a claim of ownership and a denial of the plaintiff's title, and, after a trial, the judgment was in favor of the plaintiff for the return of the bonds, or their value, and for damages occasioned by their detention. The judgment was affirmed in this court. Thereafter, a second action was commenced against the same defendant, wherein the same plaintiff set forth the facts of the preceding litigation and alleged that during the interval between the time of the trial and the time when, upon the termination of the preceding litigation, the bonds were actually delivered, the defendant failed, neglected and refused to deliver to the plaintiff the bonds and that they were damaged by depreciation in value in a certain sum, for which judgment was demanded. A demurrer to the complaint was overruled, both at the special term and the

general term; but upon appeal to this court final judgment was ordered in favor of the defendant. It was held that the complaint disclosed a single tort, which had formed the subject of an action and had been redressed by judgment therein and that, if the defendant's continued possession, during the interval after judgment and pending the appeals therefrom, was a wrong, it was but a continuation of that wrong which was sued upon and damages which flow from a single wrong ⁵²⁰ may not be divided, so as to form the subject of separate actions.

If the decline in the value of the stock occurred before the recovery of a judgment for the plaintiff, then that was a hazard of the litigation. If the decline occurred after the judgment and pending the appeals of the defendant, as would seem to be the case, then there was no new or illegal detention of the property in controversy. But another answer to such a claim would be that the plaintiff made no demand and took no steps to enforce its judgment. The defendant exercised its right to appeal; but there was no stay of proceedings upon the judgment pending the appeals.

Upon any view of the question I am unable to perceive how the plaintiff could maintain his action, and I advise the affirmance of the judgment, with costs.

Parker, C. J., Martin, Cullen, and Werner, JJ., concur.

O'Brien and Landon, JJ., dissent.

RES JUDICATA.—THE ESSENTIAL ELEMENTS of res judicata are the identity of the parties and of the issue. And the issue will be deemed the same whenever, in both actions, it is supported by substantially the same evidence: *Morrison v. Clark*, 89 Me. 103, 56 Am. St. Rep. 395, 35 Atl. 1034. See, also, *Watson v. Richardson*, 116 Iowa, 698, 80 Am. St. Rep. 331, 80 N. W. 416; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599. That the form of action is different is immaterial: *Agnew v. McElroy*, 10 Smedes & M. 552, 48 Am. Dec. 772. Moreover, the rule that matters which have received judicial determination cannot again be called in question applies not only in the same jurisdiction, but as between courts of law and equity: *Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 782; *Sellman v. Bowen*, 8 Gill & J. 50, 29 Am. Dec. 524.

CASES
IN THE
SUPREME COURT
OF
OREGON.

BALTE v. BEDEMILLER.

[37 Or. 27, 60 Pac. 601.]

SALES OF PERSONALTY OF WHICH VENDOR IS NOT IN POSSESSION—IMPLIED WARRANTY OF TITLE.—On the sale, at a fair price, of personal property in the possession of the vendor, the law implies a warranty of title; but if it is in the possession of a third person at the time of the sale, no such warranty is implied.

SALES.—IF THE VENDOR OF PERSONAL PROPERTY REPRESENTS HIMSELF TO BE ITS OWNER, this is tantamount to a warranty of title, though he is not in possession.

DAMAGES FOR BREACH OF WARRANTY OF TITLE—ATTORNEY'S FEE.—If a purchaser of personal property unsuccessfully defends the title thereto, which has been warranted to him, against an action brought by a third person, of which the vendor had notice, the purchaser is entitled to recover from the vendor, as part of his damages, the fee paid his attorney for making the defense.

Action by Balte against Bedemiller for breach of warranty of title to a mare, which the former had bought from the latter upon his representation that he owned the animal. One Hollsifer afterward claimed the mare, and demanded possession of her, whereupon Balte requested Bedemiller to return the purchase money. He refused to do this and denied that Hollsifer was the owner. Hollsifer then commenced an action to recover possession, and Balte requested Bedemiller to make the defense. He did not do so, and Balte was compelled to employ counsel for that purpose. It was adjudged that Hollsifer owned the mare. Balte then brought this action, demanding a judgment for the purchase price, costs, and attorney's fee paid for making the defense. A demurrer was inter-

posed to the complaint, but overruled, and judgment was given as prayed for. The defendant appealed.

Granville G. Ames, for the appellant.

Stott, Boise & Stout and George C. Stout, for the respondent.

MOORE, J. 1. The complaint not having alleged that defendant was in the possession of the mare at the time of the purchase, it is maintained by defendant's counsel that no facts are stated from which a warranty of title can be implied, and that the court erred in overruling the demurrer. Plaintiff's counsel insist, however, that the complaint having alleged that defendant represented himself to be the owner of the property, his statement to that effect is a warranty of title requiring him to make good his affirmation, and hence the complaint was sufficient in that respect. The rule is pretty well settled in this country that on the sale, at a fair price, of personal property in the possession of the vendor, the law, in the absence of any statement or existence of facts or circumstances to the contrary, implies a warranty of title; but, where the property is in the possession of a third party at the time of the sale, no such warranty results, the rule of caveat emptor being applied: Benjamin on Sales, 2d Am. ed., sec. 641; Story on Sales, Perkin's ed., sec. 367; 3 Kent's Commentaries *478; 1 Parsons on Contracts, 7th ed., *574; Scott v. Hix, 2 Sneed, 192, 62 Am. Dec. 458, and notes. Blackstone, in speaking of implied warranties, says: "A purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose": 2 Blackstone's Commentaries, 3d ed., *451. "It is also universally conceded," says Mr. Benjamin ⁸⁰ in his work on Sales, section 627, "that in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel is his is equivalent to a warranty of title." In McCoy v. Artcher, 3 Barb. 323, it is held that an affirmation of title by a vendor out of possession creates an implied warranty, and subjects the vendor to the same liability as if he had possession of the property. Mr. Justice Parker, speaking for the court in announcing the decision, says: "A warranty should only be implied when good faith requires it. I think it is fair and equitable to hold that the possession of the vendor is equivalent to an affirmation of title, and that in such case the vendor shall be held to an implied warranty of title, though nothing be said on the subject be-

tween the parties. But if the property sold be at the time of the sale in the possession of a third person, and there be no affirmation or assurance of ownership, no warranty of title should be implied. If, however, there be an affirmation of title where the vendor is not in possession, the vendor should be subjected to the same liability as if he had the possession of the property."

The vendor's possession of personal property creates a presumption of his ownership (Hill's Annotated Laws, sec. 776, subd. 11), and a sale by him while so possessed, when nothing is said respecting the title, and no facts or circumstances exist tending to show that he did not intend to assert ownership, creates an implied warranty that he had a valid title; and if at the time of the sale a third party had a better title, and subsequently takes such property, or disturbs the purchaser's possession thereof, the vendor is responsible for the damages which result from a breach of such warranty: *Trigg v. Faris*, 5 Humph. 343. The right attaching to the warranty which the law implies from the vendor's possession of personal property, and his silence respecting his ownership, when he ³¹ effects a sale thereof, confer a remedy which compels him to respond in damages for a breach of such warranty. So, too, when the vendor affirms that he is the owner of an ascertained specific chattel, though not in his possession at the time of the sale, such representation is equivalent to an implied warranty of title: 2 Blackstone's Commentaries, 3d ed., *451; Benjamin on Sales, 2d Am. ed., sec. 627. And the right attaching to such warranty confers a remedy which compels the vendor to make good his assertion in case of any breach of such warranty: *Byrnside v. Burdett*, 15 W. Va. 702. It does not clearly appear from an examination of the complaint that the mare was not in defendant's possession at the time of the sale; but, however that may be, the allegation of his assertion of ownership is tantamount to a warranty, which renders him liable for a breach thereof, and hence the complaint is sufficient in that respect.

2. It is contended by defendant's counsel, upon the authority of *Olds v. Cary*, 13 Or. 362, 10 Pac. 786, that plaintiff was not entitled to the expense incurred in the employment of an attorney, and that the court erred in rendering judgment for any sum on account thereof. In that case it appeared that Olds had been made a party defendant in a prior suit instituted by Cary to enjoin him from interfering with a certain inclosure,

in the final determination of which the temporary injunction was dissolved, the suit dismissed and the costs and disbursements taxed to and paid by Cary. Olds thereupon brought an action upon the undertaking for the injunction, alleging that he had been compelled to employ counsel in defending the suit, and incurred an expense of one hundred and fifty dollars on account thereof, which he sought to recover; and, having secured a judgment for that sum in the court below, Cary appealed, whereupon it was determined that a new trial should be ordered unless Olds remitted the sum of one hundred dollars — ³² this court having found that fifty dollars was a reasonable compensation for the expense occasioned in an unsuccessful effort made during the progress of the case to dissolve the preliminary injunction. An actual controversy existed between Olds and Cary respecting an inclosure, and to allow attorney's fees to the prevailing party, in excess of that prescribed by statute, would, in effect, compel the defeated party in every instance to bear all expenses of that character incurred by his adversary in the trial of a cause. A party, in order to maintain his rights in a suit or action, is ordinarily obliged to employ counsel; and the expense thereby incurred is probably caused by, but is not recoverable from, his adversary, except when made so by statute, or for services in special proceedings not going to the merits, as in the Olds case. Olds' action having been predicated on a breach of the undertaking, its stipulations and conditions afforded the measure of his right; and, as that provided for the payment of such damages as he might sustain if the injunction was wrongful or issued without sufficient cause, the relief afforded was properly limited to the expenses necessarily incident to the preliminary injunction, and not to the defense of the suit on the merits: 2 Sutherland on Damages, 604; Parker v. Bond, 5 Mont. 1, 1 Pac. 209; Trapnall v. McAfee, 3 Met. (Ky.) 34, 77 Am. Dec. 152. In the action instituted by Hollsifer to recover the possession of the mare, Balte's defense was based upon Bedemiller's denial that Hollsifer was the owner. Balte and Bedemiller were not adverse parties to that action, but the latter having been notified of the nature and pendency thereof, and invited to make the defense, but having neglected to do so, the expense occasioned in the employment of counsel is attributable to his breach of the warranty of the title. If the purchaser defends the title against an action brought by a third party, of which the vendor had notice, the latter ³³ will be compelled to pay, in case the title fails,

not only the price received, and interest thereon, but also the costs and expenses of the defense. Mr. Rawle, in his work on Covenants, fourth edition, page 308, in speaking of counsel fees incurred in defending the title, says: "Such costs have, however, been held in many cases to be recoverable as a part of the damages, although no notice of the adverse suit may have been given to the covenantor." The attorney's fees constitute a part of the damage which plaintiff sustained in consequence of the defendant's breach of warranty, and judgment having been given therefor, the same is affirmed.

SALE.—A WARRANTY OF TITLE IS IMPLIED in a sale of personal property in possession of the vendor: *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; note to *Hexter v. Bast*, 11 Am. St. Rep. 879; but not when he has not possession at the time of the sale: *Huntingdon v. Hall*, 36 Me. 501, 58 Am. Dec. 765; *Scott v. Hix*, 2 Sneed, 192, 62 Am. Dec. 458.

THE RECOVERY OF ATTORNEYS' FEES IN ACTIONS for a breach of warranty of title to real property is considered in *Brooks v. Black*, 68 Miss. 161, 24 Am. St. Rep. 259, and note, 8 South. 332.

HENDERSON v. HENDERSON.

[37 Or. 141, 60 Pac. 597, 61 Pac. 136.]

HUSBAND AND WIFE—AGREEMENT FOR MAINTENANCE—PUBLIC POLICY.—If a separation between a man and wife has been induced by his misconduct, a contract made prior to a decree of divorce obtained by her against him, whereby he agreed to pay her a certain amount each month for her maintenance, is not against public policy.

DIVORCE—DECREE OF—POWER TO MODIFY AGREEMENT EMBODIED IN.—When a husband and wife have separated by reason of his misconduct, a contract whereby he agreed to pay her a certain amount each month for her maintenance, if embodied in a subsequent decree of divorce, becomes forever binding, and is not subject to revocation or modification except by the consent of the parties thereto.

Application by M. W. Henderson for a modification of a decree of divorce rendered against him and in favor of Ellen Henderson. Under this decree, he was required to support and educate the minor child of the parties during his minority, and to pay to Ellen Henderson the sum of one hundred and fifty dollars per month during the term of her natural life. The application was to modify the decree by making the amount only seventy-five dollars per month. The applicant alleged

that his business and property, and the income therefrom, had so decreased that he was no longer able to pay more than seventy-five dollars per month; and that Mrs. Henderson did not require more than that sum for her support. She answered that he ought to be estopped from seeking a modification of the decree, for the reason that, prior thereto, the parties had entered into an agreement adjusting their property rights; that this agreement, being reasonable and just, and made for a valuable consideration, was subsequently embodied in the decree of divorce; and that the defendant had complied with the terms of the agreement up to September 15, 1897; but that since then he had wholly disregarded them. A demurrer was interposed to this defense, but overruled. A reply was filed, denying the estoppel only, but alleging that the tendency of the agreement was contrary to public policy and that it was therefore void. Mrs. Henderson moved for a decree upon the pleadings. This motion was allowed, the petition was dismissed, and M. W. Henderson appealed.

Stott, Boise & Stout and Whitney Lyon Boise, for the appellant.

Charles J. Schnabel, Chamberlain & Thomas, and George E. Chamberlain, for the respondent.

145 WOLVERTON, C. J. We are now to determine whether the facts set up by the answer to the defendant's petition constitute a defense to a modification of the decree, in so far as it provides for the maintenance of the divorced wife. The facts relied upon are set forth by way of estoppel to the defendant insisting upon the modification, it being urged that a valid and binding agreement, based upon a sufficient consideration, was entered into by and between the parties, and that the decree having been given and rendered in pursuance thereof, neither party can now be heard, without the consent of the other, to deny its validity or binding force and effect.

1. It is suggested, but not urged with great confidence, that a decree of divorce whereby provision is made for the maintenance of one party by the other is final; that all matters determined thereby have become *res adjudicata*, and cannot subsequently be questioned or modified. Such decrees are generally regarded as final, unless reservation has been made in the decree for further adjudication and determination, or the statute has made appropriate provision for such further action.

No reservation was made by the decree itself in the case at bar, but the statute has made provision to the effect that, whenever a marriage shall be declared void or dissolved, the court shall have power to further decree, among other things, for the recovery of and from the party in fault such an amount of money in gross or in installments as may be just and proper for such party to contribute to the maintenance of the other, and for the appointment of one or more trustees to manage in such manner as the court shall direct any sum of money decreed for the maintenance of the wife, and that at any time after a decree ¹⁴⁶ is given the court or judge thereof, upon the motion of the other party, shall have power to set aside, alter, or modify so much thereof as may provide for the appointment of trustees for the care and custody of the minor children, or their nurture and education, or the maintenance of either party to the suit: Hill's Annotated Laws, sec. 501, subds. 3, 5, sec. 502. Mr. Justice Moore, speaking of section 502 (in *Corder v. Speake*, 37 Or. 105, 51 Pac. 647), says: "The statute authorizes the court, upon motion, to set aside, alter, or modify so much of a decree of divorce as relates to the maintenance of either party to the suit." This language is explicit, and is a rational and just interpretation of the statute; and, were it not for the contention of counsel that the question was not involved in that case, we should make no further comment. True, the provisions of the section are somewhat vague, but, when read in *pari materia*, as it should be, with the preceding section, it is manifest that the legislative intendment was to authorize a modification in that particular. Hill's Annotated Laws, section 501, subdivision 1, provides for the care and custody of the minor children; subdivision 2 for the recovery of the party in fault, and not allowed the care and custody of the children, such an amount of money as may seem proper for such party to contribute toward their nurture and education; and then follow the provisions to which allusion has already been made, touching the maintenance of the party not in fault, and the appointment of trustees for the management of such sums as shall be decreed for the maintenance of the wife, or the nurture and education of the children committed to her care and custody. The modification contemplated comprises the subject matter of these several subdivisions respecting which the court is empowered to enter its decree in the first instance, and may be tersely enumerated: 1. As

it respects the appointment of trustees ¹⁴⁷ for the care and custody of the minor children; 2. As it respects the nurture and education thereof; and 3. As it pertains to the maintenance of either party to the suit. This latter provision plainly refers to subdivision 3 of the preceding section, whereby it is provided for the recovery of the party in fault of such an amount of money as may be proper for such party to contribute toward the maintenance of the other, and this comprehends the wife in the case at bar. Such is the construction usually accorded the latter section in the practice, and is, we are convinced, within the legitimate purpose and intendment of the legislature.

The maintenance provided for by statute is an enlargement upon the signification of the term "alimony" as used in the parlance of the common law. Alimony is an allowance which, by order of the court, the husband is compelled to pay the wife from the date he has been legally separated or divorced, for her support and maintenance. This is to be distinguished, in a general sense, from an allowance pendente lite, and proceeded from the recognition of the husband's common-law liability to support the wife: 2 Am. and Eng. Ency. of Law, 2d ed., 92. But the statute contemplates an allowance out of the wife's estate in favor of the husband also, thereby extending the power to make an allowance in divorce proceedings; and the authority to modify the decree subsequent to the time of its rendition in respect to maintenance exists as well in the one case as the other—that is to say, whether the allowance is made from the husband's estate for the maintenance of the wife, or vice versa. Although the right to have an allowance awarded for maintenance has been extended by the statute to the husband, the same reasons do not exist in support thereof which formerly induced the allowance of alimony proper. His right thereto is merely statutory, and, while her right is now sustained ¹⁴⁸ by the same authority, the statute is, as to her, declarative of that which formerly existed through usage and custom in so much that it had become the unwritten law. At common law, the measure of the allowance was determined by the husband's "faculties," and this because of obligations growing out of the marriage relations to support his wife and offspring. But the rule which should regulate the measure of an allowance to the husband must stand upon an entirely different footing. Whatever that may be, it is unnecessary for us to discuss at this time. The more recent legislation has tended strongly to the removal of all disabilities of the wife which do not exist as to

the husband, and she may now contract and incur liabilities and responsibilities to the same extent and in the same manner as if she were unmarried: Hill's Annotated Laws, sec. 2997. While this fact should not detract from the reasons which support an allowance for her benefit, yet it is a strong circumstance tending to the support of her contracts relative to her maintenance made with her husband, who has always been accounted *sui juris*.

2. It is urged that the contract in controversy is against public policy and void. But this can hardly be said of it when examined in the light of adjudications uniformly adhered to for a long period of time. In *Walker v. Walker*, 9 Wall. 743, where the validity of a deed of separation between the husband and wife was called in question because it was thought to have been executed contrary to public policy, it was held to be valid, the consideration being apparent, and that it would be enforced in equity if it appeared that it was not made in contemplation of a future possible separation; but in respect to one which was to occur immediately, or for the continuance of one that had already taken place, especially was it said to be true if the separation was occasioned by the misconduct of the husband, and the provision for the ¹⁴⁹ wife's support was reasonable under the circumstances, and no more than the court would award for her as alimony should she seek such a remedy for her grievances. When the separation exists as a fact, and is not induced or occasioned by the agreement, the consideration for the husband's undertaking to pay alimony is his release from liability for the support of his wife: *Roll v. Roll*, 51 Minn. 353, 53 N. W. 716; *Pettit v. Pettit*, 107 N. Y. 677, 679, 14 N. E. 500. It may be stated, generally, that any contract or agreement between husband and wife which, by its terms or effect, is conducive to a relaxation or a severance of the marital ties is void, as contrary to public policy, and will not be upheld or maintained. But where a separation has been induced, not by collusion, but by the vicious conduct or disability of one of the parties, without inducement or fault of the other, and it has furnished just grounds for legal separation, then a contract looking to a settlement of property rights and the proper maintenance of the one not in fault is in no sense repugnant to public policy: *Randall v. Randall*, 37 Mich. 563.

3. In Wisconsin it has been determined, in effect, under a statute authorizing the court from time to time, upon petition of either of the parties, to revise and alter the decree as it

may respect alimony or an allowance for the wife and children, that, notwithstanding the parties may have entered into an agreement anterior to the decree touching the amount of such alimony, the terms of which were incorporated in the decree, yet that the court was authorized to subsequently modify the allowance: *Blake v. Blake*, 68 Wis. 303, 32 N. W. 48; *Blake v. Blake*, 75 Wis. 339, 43 N. W. 144. The strong tendency of adjudications elsewhere, however, establishes a contrary doctrine—that when parties have agreed between themselves touching the allowance, and the same is reasonable, and such as ought to be granted under the circumstances ¹⁵⁰ and conditions attending the divorce proceedings, having in view the station and capabilities of the parties to respond, and not being contrary to the policy of the law, such an agreement, subject to the approval of the court, is binding upon the parties thereto. In *Calame v. Calame*, 25 N. J. Eq. 548, the husband had deserted his wife, and while he was living in a state of willful estrangement from her he offered in writing to turn over to her certain lands, and to pay her a sum of money, which she accepted in writing. The court, in subsequently granting the wife a divorce, further decreed that she was entitled to the lands and money agreed upon. Under the statute of New Jersey, alimony could not be given in gross, nor in a portion of the real estate of the husband. It was held, however, notwithstanding the court could not enforce an agreement as between the parties to live apart, yet that it could and would enforce an agreement, in a proper case, for the payment of the sum intended for separate maintenance according to the stipulations, and this without the intervention of a trustee, although the husband and wife could not ordinarily enter into a binding contract with each other. Mr. Chief Justice Beasley, in concluding his opinion, said: “My deduction from these principles and decisions is that it was within the competency of equity to enforce, as a part of the decree of divorce, the agreement made in lieu of alimony between the complainant and defendant. I do not mean, however, that every agreement which is thus made will be supported. The court should undoubtedly look into these arrangements and their surroundings; but when it appears that the separation of the wife, forming the groundwork of the agreement, was justifiable, and the provision is suitable, to this extent, it is, in my judgment, safe to say that the contract should be upheld.” In *Stokes v. Anderson*, 118 Ind. 533, 552, 21 N. E. 331, 338, ¹⁵¹ it was said: “It may be that, if an

action for divorce is pending, or if, in anticipation of such an action, the parties meet and agree upon the amount of alimony to be allowed to the wife in case a divorce is granted, and the arrangement is just and equitable, and confined strictly to the matter of alimony, it will be sustained. But if the agreement is broader in its terms, and its tendency is to interest the husband in procuring a divorce, or in foregoing resistance to an effort by his wife to that end, then it is contrary to public policy, and is void": *Everhart v. Puckett*, 73 Ind. 409. See, also, *Dutton v. Dutton*, 30 Ind. 452.

In *Buck v. Buck*, 60 Ill. 241, a decree was granted the wife, reciting, among other things, that the husband was a man of large property; that, alimony having been settled between the parties upon the basis therein stated, it was accordingly decreed that the husband pay to the wife twelve thousand dollars, and the further sum of one thousand dollars, the value of certain furniture and silverware, and that he should maintain and educate an adopted child. The case went to the supreme court, and as a ground of reversal it was urged that the alimony allowed by the court was excessive and oppressive. But it was held that the husband, having consented to the provision of the decree, should have no relief against his own voluntary agreement, the court saying: "Whether the alimony is too high, or whether the court had any lawful authority to make provision for the maintenance of the adopted daughter without the consent of the plaintiff in error, it is not now necessary for us to express an opinion. It was competent for the plaintiff in error to consent to such a decree, and, having done so, it must remain forever binding on him." So, in *Storey v. Storey*, 125 Ill. 608, 18 N. E. 329, 8 Am. St. Rep. 417, it was held that, "while it was true that husband and wife ¹⁵² cannot lawfully enter into an agreement for divorce, yet it is well settled that the amount of alimony which the husband is to pay to the wife, and the terms of the payment, and the length of time during which such payment is to continue, may be all arranged between them by consent." So a decree awarding alimony in gross or out of the husband's realty, based upon the agreement of the parties, even where the statutory provisions do not permit an allowance in that mode, has been upheld and enforced: *Crews v. Mooney*, 74 Mo. 26; *Russell v. Russell*, 4 G. Greene, 26, 61 Am. Dec. 112. As bearing upon the question, see, also, *Owen v. Yale*, 75 Mich 256, 42 N. W. 817; *Petersine v. Thomas*, 28 Ohio St. 596; *Stratton v. Stratton*, 77 Me. 373, 52 Am.

Rep. 779; *Morrison v. Morrison*, 49 N. H. 69. We conclude, therefore, in consonance with these latter authorities, that the better rule is that, notwithstanding the court has power and authority to modify its decree of divorce touching the awarding of a sum of money for the maintenance of either the husband or wife by the other subsequent to the entering of the decree, yet, nevertheless, they may agree in a proper case touching the amount of such sum and the manner of its payment, subject to the approval of the court as to its validity in good morals and as conformable to public policy, and in further consideration of the status and condition of the parties relating to the question of its fairness and equability of adjustment; but that, when such an agreement has been approved by the solemn decree of the court, it becomes forever binding, to the same degree and with like effect as ordinary contracts between parties admittedly *sui juris*, and is not subject to revocation or modification, except by the consent of the parties thereto. In this view the decree of the court below must be affirmed, and it is so ordered.

HUSBAND AND WIFE.—AN AGREEMENT FOR SEPARATION between husband and wife and for her separate support may be valid: *Clark v. Fosdick*, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. 1111; note to *Stephenson v. Osborne*, 90 Am. Dec. 367-370. But see *Scherer v. Scherer*, 23 Ind. App. 384, 77 Am. St. Rep. 487, 55 N. E. 494; *Galusha v. Galusha*, 116 N. Y. 635, 15 Am. St. Rep. 453, 22 N. E. 1114. As to the effect of a subsequent divorce on such an agreement, see *Atherton v. Atherton*, 155 N. Y. 129, 63 Am. St. Rep. 650, 49 N. E. 933; *Carey v. Mackey*, 82 Me. 516, 17 Am. St. Rep. 500, 20 Atl. 84; *Clark v. Fosdick*, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. 1111.

AN ALLOWANCE FOR ALIMONY or maintenance may, as a rule, be modified: *Cole v. Cole*, 142 Ill. 19, 84 Am. St. Rep. 56, 31 N. E. 109; *Howell v. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. 770; *Anderson v. Anderson*, 124 Cal. 48, 71 Am. St. Rep. 17, 56 Pac. 680, 57 Pac. 81.

NON-SHE-PO v. WA-WIN-TA.

[87 Or. 213, 62 Pac. 15.]

DESCENT—LANDS WITHIN UMATILLA INDIAN RESERVATION.—The question of heirship to lands which belonged to an allottee thereof within the Umatilla Indian Reservation must be determined from the statutes of Oregon.

ADOPTION—REQUISITES OF.—Another's child cannot be adopted except pursuant to the decree of a competent court, made in conformity with the statute.

ADOPTION—INDIANS—CUSTOM.—The custom of Indians, which makes one caring for an abandoned child its adopted parent, and gives to it all the rights and privileges of a natural child, does not amount to an adoption.

Suit by Non-she-po against the defendant to determine an adverse claim to land. The complaint was dismissed and the plaintiff appealed.

Stillman & Pierce and A. D. Stillman, for the appellant.

Thomas G. Hailey, for the respondents.

214 BEAN, C. J. 1. This is an appeal from a decree dismissing a complaint in a suit, under section 504 of the statute (Hill's Annotated Laws), to determine an adverse claim to real estate. The parties are Indian women belonging to the Umatilla and Walla Walla tribes, respectively; both residing upon the Umatilla Reservation. The real property in controversy is a forty acre tract of such reservation, in possession of the plaintiff, allotted, under the act of March 3, 1885 (23 Stats., c. 319), to one George Pearson, who died prior to the commencement of the suit, leaving no lineal descendants, and neither a wife nor a father. Defendant is the mother, and plaintiff the grandmother, of Pearson. The complaint alleges that in the year 1879, when Pearson was about four months old, he was abandoned by his mother and left to perish; that thereupon he was taken and cared for by the plaintiff until his death; that, according to an immemorial custom among the tribes of Indians residing on the reservation, whenever an infant is abandoned by its parent or parents the person caring for it becomes its adopted parent, and thereafter has and enjoys all the rights and privileges which would have been enjoyed and possessed by its parent or parents if it had not been so abandoned, and such infant becomes the adopted child of the person so caring for it, and enjoys all the rights and privileges of a

natural child; that by reason of these facts the infant, Pearson, became to all intents and purposes the son of the plaintiff, and the defendant thereby abandoned and forever surrendered all rights and privileges of heirship she might otherwise have had by reason of being the mother of such child. The plaintiff therefore claims to be the heir of Pearson, and as such entitled to inherit the forty acres of land allotted to him under the act of Congress, while the defendant ²¹⁵ claims that she is entitled to the property as his natural mother.

The act of Congress referred to provides for the allotment in severalty of the land comprised within the Umatilla Reservation to the Indians residing thereon, and that after such allotment "the President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of such trust and free of all charge or encumbrance whatsoever." It thus appears that, under this statute, in case of the death of an allottee the title of the land allotted to him shall descend to his heirs "according to the laws of the state of Oregon," so that the question of heirship must be determined from the statutes of this state.

2. The right of the plaintiff to recover depends upon whether, under the custom alleged in the complaint, she became the legally adopted mother and heir of the infant, Pearson, by reason of his mother's abandonment and her subsequent nurture and care of him. Now, adoption is the taking into one's family the child of another as son and heir, and conferring on it a title to the rights and privileges of such. It is a right purely statutory, and was unknown to the common law. It was, however, a feature of the Roman law, but even according to that system some special authority of law was necessary to constitute an adoption: *Ballard v. Ward*, 89 Pa. St. 358. It never was in the power of an individual, either by the common law of England or the Roman law, to adopt the child of another at his own volition, or by the consent of its parents: *Abney v. De Loach*, 84 Ala. 393, 4 South. 757. There must be some

special authority for such a proceeding. In this state it requires the decree of a competent court, made in conformity to the provisions of the statute, to confer on a child the capacity or equality of heir to a stranger: *Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 20 Pac. 842.

3. In the matter of marriage between Indians, tribal customs have been recognized by the courts because they were in conformity to natural rights. But the right of adoption is contrary to natural law, and we have been unable to find any case reported where adoption by custom has been sanctioned or maintained. It follows from these views that the decree of the court below must be affirmed, and it is so ordered.

THE RIGHT TO ADOPT CHILDREN is said to be unknown to the common law: See the monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210; *Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 20 Pac. 842. Adoption is purely a statutory matter, and proceedings therefor must be in substantial conformity with the provisions of the statute; but the statute must be given a liberal construction in order to uphold proceedings under it: *Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. 23. In some jurisdictions it is held that adoption proceedings must be in strict accordance with the statute: *Watts v. Dull*, 184 Ill. 86, 75 Am. St. Rep. 141, 36 N. E. 303; *Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 20 Pac. 842.

MISER v. O'SHEA.

[37 Or. 231, 62 Pac. 491.]

COUNTERCLAIM—ONE TRESPASS AGAINST ANOTHER.—A counterclaim must be connected with the subject of the suit, and one independent trespass cannot be used as a set-off against another consequent upon it.

COUNTERCLAIM—CONNECTION WITH SUIT—INDEPENDENT TRESPASS.—If the owner of a placer mining claim runs debris down upon another, and the owner of the lower claim brings an action for damages, and to enjoin the upper owner from so depositing his debris, a counterclaim for damages for an injury to the defendant's claim by water backed up thereon from a dam built across the creek by the plaintiff below the defendant's mine is not connected with the subject of the suit, but arises from an independent trespass. Hence, there is no error in sustaining a demurrer to a complaint setting up such a defense.

PLEADING.—AVERMENTS IN PLEADING ARE NOT SHAM, where they are not false in fact or pleaded in bad faith.

PRESCRIPTION AGAINST THE UNITED STATES—TAILINGS, RIGHT TO DEPOSIT.—No use of premises, however

long continued, can be adverse to the United States. Hence, a miner cannot, by depositing the tailings of a mining claim upon the public domain for any length of time, thereby acquire a right to do so.

MINES — LICENSE, WHEN REVOCABLE.— When the owner of one placer mining claim runs tailings upon another, by virtue of a license, as he claims, the deposit of tailings on the lower claim does not constitute a permanent improvement thereon, which may inure to the advantage of the owner thereof, and the license, conceding it to exist, is therefore revocable, and not a defense to an action against the upper owner to obtain redress for the latter's act in flooding the plaintiff's claim with debris.

Suit by Miser against O'Shea and others for damages and to enjoin them from trespassing on certain real property. The plaintiff owned a placer mining claim on Starveout creek, in Oregon, and the defendant, O'Shea, owned a claim next above the plaintiff's. The defendant O'Shea had leased his mine to the defendants B. D. and H. Dyer and Robert Powell, who operated it, but in doing so they ran down upon the plaintiff's claim a vast area of debris, detritus, tailings, etc. To prevent a continuation thereof this suit was brought. A dam had been built by the plaintiff's lessees below the O'Shea mine across the creek, and O'Shea for a second defense in his separate answer alleged that the plaintiff's dam obstructed the flow of water in the creek, causing it to back up over his mine, thereby preventing the tailings from being carried down the stream to his damage in the sum of one thousand dollars. The court sustained a demurrer to this defense, and the trial resulted in a decree for the plaintiff. The defendants appealed.

F. W. Benson, Coshow & Sheridan, and O. P. Coshow, for the appellants.

William R. Willis and Dexter Rice, for the respondent.

234 MOORE, J. 1. It is contended that the court erred in sustaining the demurrer to O'Shea's second defense. A counterclaim is one arising out of a cause of action existing in favor of the defendant and against the plaintiff, between whom a several judgment might be had, and, as far as applicable herein, must be connected with the subject of the suit: Hall's Annotated Laws, secs. 73, 393. If it be assumed that the injury resulting to said defendant in consequence of the plaintiff's construction of his dam afforded a cause of action upon which a judgment might be rendered, the question to be considered is whether such alleged counterclaim is connected with the subject of the suit. This suit being for a tort, the injury con-

complained of is the wrong, which consists of the deposit of debris upon plaintiff's mine, and the right, or subject of the suit, is the property which is affected by the alleged trespass: Bliss on Code Pleading, 3d ed., sec. 126. Thus, in *Lovensohn v. Ward*, 5 Cal. 8, it was held that the subject matter of the litigation, in an action of replevin, was the property alleged to have been unlawfully taken by the defendant, who could not, in his answer, allege that the plaintiff had taken from him other property than that mentioned in the complaint, and ask or secure a judgment for its return, although he presented such a case as would have enabled him to recover in an independent action. The injury alleged to have been sustained by ²³⁵ the defendant does not affect the property described in the complaint, and hence the counterclaim was not connected with the subject of the suit, and no error was committed in sustaining the demurrer.

2. The action of the court in sustaining the demurrer can also be upheld under the rule that one independent trespass cannot be used as a setoff against another consequent upon it: *Waterman on Setoff*, 2d ed., sec. 136; *Lovejoy v. Robinson*, 8 Ind. 99; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Schweizer v. Weiser*, 6 Rich. 159; *Hart v. Davis*, 21 Tex. 411.

3. It is insisted that the court erred in striking out as sham a part of the answer of B. D. Dyer, H. Dyer, and Robert Powell. The motion upon which the order complained of was made as predicated upon the ground that the part of the answer assailed was sham, frivolous, irrelevant, and redundant. The averment that plaintiff leased his mine to said defendants, in consideration of which they dug a ditch, constructed flumes, and put in sufficient pipe to operate it, was not false in fact or pleaded in bad faith, and therefore was not sham: *Foren v. Dealey*, 4 Or. 92; *The Victorian*, 24 Or. 121, 41 Am. St. Rep. 338, 32 Pac. 1040. Our statute, however, provides that, if irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of the adverse party: *Hill's Annotated Laws*, sec. 85. The matter stricken out being clearly irrelevant and redundant, no error was committed in this respect.

4. It is claimed that defendant's predecessor, having deposited tailings upon that part of the public domain now embraced within plaintiff's mine, thereby appropriated the premises for that purpose, and that plaintiff took his mining claim subject to such prior right. Such a rule seems to have been adopted in California: *Jones v. Jackson*, 9 Cal. 237; *O'Keiffe v. Cun-*

ningham, 9 Cal. 589, ²³⁶ but we cannot yield our consent thereto; for no use of the premises, however long continued, can be adverse to the United States, and, as the defendant has not deposited his tailings on the plaintiff's mine for a period of ten years since the United States parted with its title thereto, no claim to continue such use can be predicated thereon: King v. Thomas, 6 Mont. 409, 12 Pac. 865; Mayer v. Carothers, 14 Mont. 274, 36 Pac. 182.

5. It is contended that the evidence shows that the defendant had a license to deposit debris on the mine below his, and that, acting upon the faith of such permission, he, with plaintiff's knowledge, expended large sums of money in purchasing and improving his property, in consequence of which the license had become irrevocable; and, this being so, the court erred in enjoining him from continuing the use of said premises. O'Shea does not allege that any consideration was paid for the license relied upon, nor does he aver any facts from which an estoppel could be implied, but, the cause having been tried on such theory without objection, the question will be considered. O'Shea, as a witness in his own behalf, testifies that before purchasing his mining claim the plaintiff told him he had no objection to his having an outlet across his land for dumpings and drainage, saying to the witness, "You can dump where you please"; that, having secured such permission, and relying thereon, he purchased his mining claim, and expended large sums in improving his property, which he would not have done except for such license. Plaintiff in his testimony makes a general denial of the license so attributed to him.

But, if it be admitted that he consented to the defendants' use of his premises as stated, we do not think the character of the work done in pursuance thereof sufficient to render the license irrevocable. The evidence fails to show what sum the defendant paid for his mine, ²³⁷ or for the ditch or flume constructed thereon, and, for all that appears from an inspection of the transcript, he may have been amply remunerated for such outlay by the gold realized by operating the mine. If the defendant, as he testifies, could deposit debris on the plaintiff's mine where he pleased, the result would necessarily be that he could appropriate the surface of the servient estate, if he chose to exercise the right upon which he insists. This court has adopted the rule that if a party, relying upon the faith of an express parol agreement, make permanent valuable improvements upon an estate, which may inure to the advantage of the

owner thereof, the license upon the faith of which the improvements are made cannot be revoked to the prejudice of the party executing it: *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. Ann. 484; *McBroom v. Thompson*, 25 Or. 559, 42 Am. St. Rep. 806, 37 Pac. 57; *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10; *Hallock v. Suitor*, 37 Or. 9, 60 Pac. 384. It appears from the transcript that tailings deposited along the banks of the creek have been worked over several times, yielding sufficient gold to pay for the labor thus expended, so that it may be reasonably inferred that plaintiff would derive a benefit from the deposit of which he now complains; but inasmuch as the debris does not constitute a permanent improvement, and is liable to be carried out by the first freshet in the stream, we think the license, if it be conceded that it existed, was revocable.

The defendants B. D. and H. Dyer failed to establish a license to deposit debris from O'Shea's mine on plaintiff's premises; for, notwithstanding they settled upon the terms of such an agreement, for which they paid a consideration, the contract, which was to be in writing, was never executed, each party refusing to subscribe his name to a memorandum prepared by the other. The decree having recognized the defendants' prior right to the use ²³⁸ of the water in the right fork of said creek, it is unnecessary to consider the contention of defendants' counsel respecting such right or to comment upon the effect of an adverse use of the waters thereof. The defendants assign other errors in the printed abstract but not having been insisted upon in their brief, they are deemed waived and the decree is affirmed.

SETOFF.—AN INDEPENDENT TORT cannot be made a defense against another tort, either by way of setoff or counterclaim: *Keller v. B. F. Goodrich Co.*, 117 Ind. 556, 10 Am. St. Rep. 88, 19 N. E. 196. To be available as a counterclaim, a tort must grow out of or be connected with the subject of the action or transaction set forth in the complaint: Note to *Woodruff v. Garner*, 89 Am. Dec. 486.

ADVERSE POSSESSION.—AS AGAINST THE UNITED STATES, there can be no adverse possession: See the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 479-486.

MINES AND MINING.—THE DEBRIS QUESTION is discussed in the note to *Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 551, 557.

LICENSE — REVOCABILITY.—A mere naked license, predicated upon an invasion of another's right, which is in effect a trespass upon his property, does not so encourage a party to act upon the faith of the implied permission as to render it irrevocable: *Ewing v. Rhea*, 37 Or. 583, post, p. 783, 62 Pac. 790.

ROBERTSON v. ROBERTSON.

[37 Or. 339, 62 Pac. 377.]

PLEADING—PAYMENT.—If an issue is formulated by the allegation of an amount due and a denial thereof, evidence tending to prove payment is admissible, though payment was not specially pleaded as a defense.

In a suit between Louise Robertson and George F. Robertson, the Blake-McFall Company was cited as garnishee, and appealed from a judgment against it.

John F. Logan, for the appellant.

Harry K. Sargent, for the respondent.

340 WOLVERTON J. This is a proceeding against a garnishee, wherein the appellant, the Blake-McFall Company, was cited to appear and answer certain allegations and interrogatories touching its indebtedness to the defendant, George F. Robertson. Among others, it is alleged "that the plaintiff is informed and believes that the said garnishee, at the time the said execution was levied as aforesaid, was indebted to the defendant, for work and service performed by the defendant at the request of said garnishee between the — day of —, 189—, and the date of said levy, in a large sum of money, the exact amount of which is unknown to this plaintiff, but sufficient to satisfy said decree." By stipulation of the parties this allegation was considered specifically denied, and upon the issue thus formulated they went to trial. The bookkeeper of the company was called in behalf of the plaintiff, and testified, in substance, that he knew the defendant, George F. Robertson, and that he was and had been in the employ of the company for eight years immediately prior thereto, at a salary of one hundred dollars per month. Upon cross-examination the company attempted to show that it was not indebted to defendant, Robertson, on May 17, 1898, the date of the levy of the execution, in any sum, and that he had then received all sums of money earned by him while 341 in its employ; but upon objection to its introduction the proof was rejected by the court. Thereafter the company made the bookkeeper its own witness, and sought to prove the same matter, with a like result. The action of the court in these particulars has been assigned as

error, and gives rise to the only question which it is necessary to consider at this time.

It is urged by counsel for respondent that the testimony was not admissible under the pleadings, because it tended to prove payment—a fact the company had neither alleged nor set up in its answer to said allegations—and that such fact was matter of defense, which should be affirmatively alleged before it could be proved. The question was presented as one of pleading purely, and we will so treat it. Generally speaking, payment cannot be shown in defense of an action under the traverse alone, but must be specifically alleged as matter in avoidance, in order to be available: *Benicia Agr. Works v. Creighton*, 21 Or. 495, 28 Pac. 775, 30 Pac. 676; *Clark v. Wick*, 25 Or. 446, 36 Pac. 165; *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696. There seems, however, to be a well-settled exception to this rule. Where an allegation, not stated as a conclusion of law, is so framed that an issue is presented by the traverse upon the fact of the amount due, proof of payment is admissible without an affirmative plea in the nature of a further defense. Thus, in *Quin v. Lloyd*, 41 N. Y. 349, the complaint stated the amount of defendant's indebtedness to plaintiff for services performed, without showing the value or extent thereof, which was followed by an allegation to the effect that the defendant, on a day named, became indebted to plaintiff in the sum of three hundred and thirty-three dollars and seven cents, being the balance remaining due after sundry payments by the defendant to the plaintiff; and it was held, under a denial of the allegations, that the defendant was entitled to prove payment to the ³⁴² plaintiff on account of the alleged services. So, in *Marley v. Smith*, 4 Kan. 155, it was alleged that at the commencement of the action the defendant was indebted to the plaintiff in the sum of seventy-five dollars on an account, a copy of which was annexed, and that the same was still due; and it was held that, while proof of a setoff or counterclaim was not admissible, yet that proof of payment was, and this upon the ground that the petition merely declared the amount of defendant's indebtedness to plaintiff, without stating the facts constituting the liability. To the same effect, see *Pomeroy's Code Remedies*, 3d ed., secs. 699, 700; *Knapp v. Roche*, 94 N. Y. 329. The allegation which we are considering imports nothing more than that the company on the date of the levy of the execution was indebted to the defendant, Robertson, for services rendered, in a sum sufficient to satisfy the plain-

tiff's decree. There are no facts alleged or shown whereby the circumstance of such indebtedness could be deduced as a conclusion of law. Hence, the amount of the indebtedness being the only fact alleged by which it may be said to exist, it was traversable; and, being traversed, it was proper to show payment under the issue thus formulated, to refute the fact of its existence. In this view of the law, the lower court was in error in rejecting the testimony offered. Its judgment will therefore be reversed, and the cause remanded for such further proceedings as may seem proper.

PLEADING PAYMENT.—Evidence of payment is not admissible unless payment is specially pleaded: *Landry v. Baugnon*, 17 La. 82, 86 Am. Dec. 606. Payment cannot be shown under a general denial: *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696. Compare *Crews v. Bleakley*, 16 Ill. 21, 61 Am. Dec. 58, and see the note thereto discussing this subject.

FANNING v. GILLILAND.

[87 Or. 309, 61 Pac. 636, 62 Pac. 209.]

APPEAL AND WRIT OF REVIEW, CONCURRENT PROSECUTION OF.—As a writ of review is made concurrent with the right of appeal, an appeal from the assessment of damages in a proceeding for opening a public road does not waive the right to have the regularity of the proceeding to lay out and establish the road reviewed at the same time, on a writ of review.

EMINENT DOMAIN—PUBLIC ROAD—PUBLIC USE.—The taking of property for a public road is a taking for a public use.

EMINENT DOMAIN—PUBLIC ROAD—DUE PROCESS OF LAW.—The laying out, over private property of a road, which is a public way, open to all who may desire to use it, is not a taking of property without due process of law, though the road accommodates but a single family.

JURISDICTION—QUESTION OF, MAY BE HEARD, WHEN.—The question of jurisdiction may be for the first time raised in the supreme court.

HIGHWAYS—ANSWER IN PROCEEDINGS FOR, WHEN NOT ALLOWABLE.—Though a petition for the location and establishment of a highway avers that the petitioner's residence cannot be reached by any convenient public road, and that it is necessary for him and the public to have ingress and egress to and from such residence, no answer can be made thereto if the statute does not provide therefor, and if filed may be stricken out; and if the statute declares that upon the presentation of a verified petition the court must appoint viewers, such petition cannot be controverted.

EMINENT DOMAIN—PRIVATE ROAD, WHEN A PUBLIC USE.—If, by a fair construction and operation of a statute, a road, when laid out, is in fact a public road, for the use of all who may desire to use it, the law is constitutional, though the road may have been applied and paid for, and kept in repair by, one for whose benefit it was primarily designed.

EMINENT DOMAIN—PUBLIC USE, QUESTION OF IS FOR THE JUDICIARY.—While the legislature usually takes the initiative, and by its enactment of laws necessarily declares whether a use for which they authorize the taking of private property is public, still it remains for the courts to ultimately determine this question when it is appropriately brought to their notice.

HIGHWAYS—VIEWERS' REPORT—"LEAST DAMAGE" IN LAYING OUT—ISSUE OF FACT.—When viewers appointed to lay out a public road over private property report that they have so laid out the road as to cause the "least damage," such fact is not issuable. Neither are the objectors entitled to a hearing upon the justice of the viewers' report.

HIGHWAYS—ORDER ESTABLISHING ROAD—WHEN VALID.—If a petition to lay out a public road designates the exact route to be taken, the order establishing the road will not be disturbed, though the court directed the road to be located according to the petition, if the report of the viewers shows that the road so laid out was located so as to do the least damage to the land through which it passes.

EMINENT DOMAIN—HIGHWAYS—TAKING PROPERTY FOR ROAD—JUST COMPENSATION.—An order of court declaring a road to be a public highway, and directing it to be opened on payment of the costs and damages assessed by the viewers, is not a taking of property without just compensation first assessed and tendered, though the costs and damages are not paid until after its entry. Under such an order, there is no appropriation of property, except upon the condition of the payment of costs and damages.

Writ of review, by Fanning and others against Gilliland and another, to test the legality of a proceeding establishing a public road across the lands of the plaintiffs. The sworn petition for the establishment of the road showed that Clopton, one of the petitioners, was the owner of a certain forty acres of land; that he had a dwelling-house thereon, occupied by Gilliland, the other petitioner, under a lease; that the petitioners' residence was not reached by any convenient public road or otherwise; that it was necessary that the petitioners and the public should have ingress to and egress from such residence; that there had been a road from such residence across Fanning's land, but that Fanning had closed it and refused to permit the petitioners to use it; that such closing had cut off all means of ingress to and egress from the residence; and that a good road, convenient to the petitioners' residence could be laid out, constructed, and established upon the line of the old road so closed without doing unnecessary damage. It was prayed that view-

ers be appointed, etc. To this petition the plaintiffs filed objections, challenging the jurisdiction of the court over the subject matter and putting in issue all the material allegations thereof. Upon motion of the petitioners, these objections were stricken out, and the court appointed viewers with directions. The viewers made a report, to which the plaintiffs objected, and the objectors requested permission to produce evidence to show that the report made was not just. These objections were also stricken out. The report was confirmed and the road established. A writ of review to the circuit court having been sued out by the plaintiffs, and there dismissed, they appealed to the supreme court.

J. H. Raley, John J. Balleray, and Thomas G. Hailey, for the appellants.

James A. Fee and Robert J. Slater, for the respondents.

372 WOLVERTON, J. 1. The respondents moved to dismiss the appeal, for the reason that the plaintiffs had appealed to the circuit court from the assessment of damages, it being contended that by prosecuting such appeal they have waived the right to prosecute their remedy by writ of review. In this contention we cannot concur, for two reasons: 1. It was not the purpose of the statute, in giving the appeal from the assessment of damages, to permit the regularity of the proceedings for the establishment of the road to be questioned therein; and 2. By section 585 of Hill's Annotated Laws, as amended by the act of 1889 (Sess. Laws 1889, pp. 134, 135), the writ of review is made concurrent with the right of appeal, so that an appeal from the assessment of damages does not waive the right to have the proceeding to lay out and establish the road reviewed at the same time. As bearing upon the question whether the remedies are concurrent, see *Hill v. State*, 23 Or. 446, 32 Pac. 160; *Kirkwood v. Washington County*, 32 Or. 568, 52 Pac. 568. The motion is therefore denied.

It is urged that it was error to strike out the answer to the petition for the location and establishment of the road, because it tendered issues upon matters of law and fact essential to be established before the prayer of the petition could be granted. Among them were: 1. That the use for which it was proposed to appropriate the plaintiffs' lands was not a public use; 2. That the residence of the petitioners was at that time reached by a convenient public road; and 3. That the road proposed

by the petition was not located so as to do the least damage ³⁷³ to the premises of the plaintiffs. It was sought to produce evidence upon all these questions, and to obtain a hearing upon them as questions of fact, and it is urged that the court was powerless to proceed without it, issues thereon having been tendered. The law has made no provision for any such hearing, although it requires notice to be given of the appointment of viewers to lay out the road, and assess the damages accruing by reason of its location and establishment. It cannot be doubted but that all these questions are matters for judicial determination. The first two must be adjudicated and determined before the viewers can be appointed, but the latter is to be resolved with their assistance, when authorized to act.

2. As it pertains to the first question or issue, the proposition is advanced that private property cannot be taken for private use, even with compensation, and therefore it must be first determined that the proposed taking is for a public use, before damages can be legitimately assessed; hence, that an adjudication of the fact that the use is public, without an opportunity of being heard, is the taking of property without due process of law, and inimical to the national constitution. This is a question which challenges the jurisdiction of the court; for, if it be true that a road of public easement such as is provided for by statute is not the taking of property necessary to its establishment for a public use, then the court is without authority to act, and the proceeding ought to stop whenever attention is called to it. This court has, however, decided that the taking of property for such a purpose is a taking for a public use. Mr. Justice Bean, in *Towns v. Klamath County*, 33 Or. 225, 232, 53 Pac. 604, says: "The principle to be deduced from the adjudged cases bearing upon the question seems to be that if, by a fair construction and operation of the statute, the road, ³⁷⁴ when laid out, is in fact a public road, for the use of all who may desire to use it, the law is not liable to the charge of unconstitutionality, and is valid, though the road may be laid out on the application of, paid for and kept in repair by, the petitioner, and primarily designed for his benefit; but if such road is to become a mere private way, and not open to the public, the law sanctioning it is void. . . . Within this principle, the act in question is valid. The road provided for is an open, public way, thirty feet in width, which may be traveled by any person who desires to use it. The fact that it may accommodate but a limited portion of the public,

or even but a single family, is no objection to the validity of the law providing for its location. The test is whether it is an open, public way, or one for the exclusive use and benefit of the petitioner."

We are aware that the question whether the use is in fact public is one for ultimate determination, under the constitution, by the judiciary; that while the legislature usually takes the initiative, and, in its adoption of laws looking to the purpose, necessarily passes upon their constitutionality, it is yet within the exclusive and peculiar functions of the courts to determine the question, whenever appropriately brought to their notice: *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790; *Apex Transp. Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882; *Chicago etc. R. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Lewis on Eminent Domain*, sec. 158; 10 Am. & Eng. Ency. of Law, 2d ed., 1069b. The question being one of jurisdiction, it may be heard at any stage of the proceeding, as well in the circuit as in the county court; and, under the settled rulings of this court, it may be heard here for the first time. There is no issue of fact to be joined upon the question. The statute has prescribed what may be ³⁷⁵ done, and the matter of determination whether the appropriation of the lands necessary to the establishment of the road is for a public use is capable of being solved, under the statute, from the record. No facts that may be proven can present a different issue than such as the law itself has tendered, and the notice which is required to be given by a service of the order of appointment of the viewers gives ample opportunity for hearing upon this jurisdictional question, so that it cannot be said that the taking is without due process of law. In reality, the county court passed upon the question when it entertained cognizance of the cause against the protests of the plaintiffs that it was without jurisdiction over the subject matter.

3. The next question, viz., whether the residence of the petitioners could be reached by any public highway, and another closely allied to it, whether it is necessary that such persons and the public shall have ingress and egress to and from the residence of such persons, are political or legislative in their character, and the mode and manner of their ascertainment and determination are matters wholly within the authority of the legislature to devise: *Towns v. Klamath County*, 33 Or. 225, 53 Pac. 604; *Zimmerman v. Canfield*, 42 Ohio St. 463; *Peo-*

ple v. Smith, 21 N. Y. 595. The legislature having provided that, upon a sworn petition of the person whose residence is not reached by a convenient public road, the court may appoint viewers, the law has prescribed that this is sufficient to set the court in motion. These facts are not issuable, because not made so by statute, and are sufficient when appearing by the petition, because it fulfills or constitutes the mode of procedure pointed out by the law. As was said in *Towns v. Klamath County*, 33 Or. 225, 53 Pac. 604, touching the question of the exercise of eminent domain, "it is sufficient for the protection of his ³⁷⁶ constitutional rights if he has notice, and is given opportunity at some stage of the proceedings to be heard upon the question of compensation for his land so appropriated."

4. The third question, viz., whether the road proposed by the petition was located thereby so as to do the least damage to the premises over which it passes, is one to be ascertained by the viewers for the advisement of the court. This is not a preliminary question, as are the preceding ones, to be determined by the court, and essential to the exercise of the power and authority to proceed, but is an issue subsequent to the acquirement of jurisdiction, and constitutes but a method of procedure in laying the road. The procedure must be substantially followed in the establishment of the road; but the objections thereto are not permitted to form an issue touching the fact of "least damage" to be tried in any other way than by the report of the viewers. This they try without issue being made upon the pleadings, and make report of their findings under the law. Like the last preceding questions, it is legislative in its character, and the procedure adopted for the ascertainment of the fact may be pursued without an opportunity for a hearing, where provision is made therefor, upon the ultimate question of damages as compensation for the taking. Nor do we think that the objectors were entitled to a hearing upon the justice of the viewers' report. That is a matter to be determined from the report itself, and it cannot be disputed by any method not prescribed by statute.

There is another question presented by the record, upon which much stress was laid at the argument. The petition asking for the establishment of the road described the proposed course with some particularity, and the order of the court directed the viewers to lay it out in accordance with the petition, and to assess the damages ³⁷⁷ sustained by reason of its establishment. The viewers made report that, "in accordance

with the prayer of the petition and the direction and orders of the county court, we proceeded to and did lay out, locate, and establish a road thirty feet in width, commencing," etc., which follows the line designated in the prayer of the petition, and "that said road was laid out on the most practical route from the point of commencement to the termination, and upon the route designated in said order appointing us as viewers, and in accordance with the prayer of the petition, and we so laid out said road as to do the least possible damage to the land over which it passed." It is urged that the order of the county court left no discretion with the viewers in the selection of the route of the road so as to do the least damage to the land over which it passed, and therefore that the court exceeded its powers. True, the order directs that the road shall be located in accordance with the petition, and this is the language of the statute. But the report of the viewers would indicate that they have located it so as to do the least possible damage to the lands over which it passes, while at the same time they show that they located it upon the line designated in the petition. This is equivalent, in our opinion, to saying that the line designated in the petition is the one which, after carefully viewing the situation, in the judgment of the viewers would do the least damage to the property owners, and this is the fulfillment of the statute.

5. It was intimated in the case of *Sullivan v. Cline*, 33 Or. 260, 54 Pac. 154, that it was probably not the intendment of the statute that the petitioner should set out the exact course on which it is desired the road should be laid, but that it is sufficient, if the petition shows the place of residence, that it cannot be reached by any public road, and that it is necessary that the public and himself shall ³⁷⁸ have ingress to and egress from such residence. The petition in this case has gone further, however, and has designated the exact route; and while the court has directed that the road be located according to the petition, which may imply that it should be located upon the route therein defined, yet the report of the viewers shows that the road so laid out was located so as to do the least damage to the land through which it passes. The ultimate result was therefore in full accord with the intendment of the statute, and, while it may have proceeded somewhat irregularly, the purpose of the statute has been subserved, and the order establishing the road will therefore not be disturbed. The judgment of the court below will be affirmed, and it is so ordered.

ON MOTION FOR REHEARING.

WOLVERTON, J. 6. The plaintiffs, by their petition for rehearing, present the further and additional question that the county court was powerless to establish the road in question without payment of the damages awarded by the viewers being first made. The statute provides that "the viewers . . . shall make a report . . . of the public road so located, and the amount of damages assessed by them, if any, and the person or persons entitled to such damages; and if the county court is satisfied that such report is just, and after payment by the petitioner of the costs of locating such road and the damages assessed by the viewers, the court shall order such report to be confirmed, and declare such road to be a public road, and the same shall be recorded as such": Hill's Annotated Laws, sec. 4077. After the preliminary recitals, the court concluded with the following entry: "It is hereby ordered, adjudged, ³⁷⁹ and decreed that the report of said viewers be, and the same is hereby, approved and confirmed in all respects; that the said road be, and the same is hereby, decreed to be a road of public easement and a public county road, and the same is hereby established and ordered opened in accordance with the report of said viewers, upon the payment of the damages in said report set forth, and the costs and expenses of this proceeding." It is stoutly urged that here is a taking of the appellants' property without just compensation first assessed and tendered, contrary to the inhibition of the state constitution (Const., art. 1, sec. 18), but counsel have evidently misconceived the effect of the order. There was no appropriation of property, except upon condition of the payment of costs and damages. By its terms, there was no establishment of the road, nor could it be opened, except upon payment as required thereby. Hence the order or judgment as entered does not operate as a taking of appellants' lands without just compensation first assessed and tendered. The purpose of the statute is to require the payment of the costs and damages before any road or public easement can be established, and, while this provisional entry may not be in full accord with the statutory intendment, yet it was calculated to command compliance with the requirements of the law prior to any appropriation. The record shows that the costs and damages were paid into the hands of the county clerk upon the ninth day after entry of the order or judgment, and before the adjournment of the term, so that there could have

more than one signification, or is used on different occasions to express distinct ideas. At times it signifies a simple indebtedness, without reference to the time of payment. 'Debitum in praesenti, solvendum in futuro.' At other times it shows that the day of payment or render has passed." In *United States v. State Bank of North Carolina*, 6 Pet. 29, Mr. Justice Story, in defining the word "due," says: "It is sometimes used to express the mere state of indebtedness, and then is an equivalent to 'owed' or 'owing'; and it is sometimes used to express the fact that the debt has become payable." In *Carr v. Thompson*, 67 Mo. 472, it was held that the word "due" was improperly used for "owing." As illustrating this definition, see also, *Leggett v. Bank of Sing Sing*, 25 Barb. 326; *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542. If it be assumed that the words "rental due," as used in the stipulation, are synonymous with "rent accrued," Hall could have entered and taken the quantity of wheat to which he was entitled, before it was harvested; but, ⁴⁷⁹ as such a method of securing the proper quantity would have been impracticable, we think that the parties meant by the use of that term that the wheat so taken by the defendant was the quantity which was ascertained to be due Hall after the grain was harvested and threshed. Having reached the conclusion that the rent was not due Hall until after the grain was harvested, which occurred after plaintiff purchased the land, but before she was entitled to the possession thereof, the rent of the premises was due her, and not Hall; for the rule is well settled that when land is leased in consideration of a part of the crop that may be raised thereon, and the lease does not contain any stipulation as to when such share is payable, it is due when the crop is harvested, or within a reasonable time thereafter: *Toler v. Seabrook*, 39 Ga. 14; *Lamberton v. Stouffer*, 55 Pa. St. 284; *Long v. Seavers*, 103 Pa. St. 517; *Brown v. Adams*, 35 Tex. 447. The rent thus reserved having accrued after the sale of the premises, the plaintiff was entitled to the same, and hence we are compelled to adhere to our former opinion.

Rehearing denied.

GROWING CROPS ARE PART OF THE REALTY: *Wooton v. White*, 90 Md. 64, 78 Am. St. Rep. 425, 44 Atl. 1026; but on severance they become chattels: *Coombs v. Jordan*, 8 Bland, 284, 22 Am. Dec. 236.

CROPS.—A BILL OF SALE does not work a severance of a growing crop: *Wooton v. White*, 90 Md. 64, 78 Am. St. Rep. 425,

44 Atl. 1026. Compare *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284.

MORTGAGE FORECLOSURE.—CROPS UNSEVERED from the land at the confirmation of a foreclosure sale become the property of the purchaser. It is otherwise with crops severed before the confirmation: *Relly v. Carter*, 75 Miss. 798, 65 Am. St. Rep. 621, 23 South. 435. See, too, *Wooton v. White*, 90 Md. 64, 78 Am. St. Rep. 425, 44 Atl. 1026.

ANDERSON v. PORTLAND FLOURING MILLS CO.

[37 Or. 483, 60 Pac. 839.]

WAREHOUSEMEN—NEGOTIABILITY OF WAREHOUSE RECEIPTS.—While the statute of Oregon makes a warehouse receipt negotiable, regardless of its form, in the sense that a transfer thereof by indorsement carries the absolute title to the commodity represented by the receipt, and does not charge a bona fide purchaser for value with knowledge of any notice of equities between the original parties, it does not give to such receipts all the attributes of negotiable paper.

WAREHOUSEMEN—WAREHOUSE RECEIPTS—PAROL EVIDENCE TO VARY—NEGOTIABILITY.—The rule prohibiting the admission of parol testimony to charge one not bound upon the face of an instrument does not apply to a warehouse receipt. In that respect the receipt is a simple contract, and such evidence is admissible to show that, although executed by and in the name of an agent, it was in fact the contract of the principal, and that the latter is bound thereby.

Action by Anderson against the defendant company for the conversion of wheat. The company was a corporation engaged in the business of buying, selling, and storing wheat and manufacturing flour at Oregon City. About four thousand two hundred and fifty bushels of wheat had been delivered, at Switzerland, Silverton, and other stations, on a branch of the Southern Pacific Railway, by Gash, Anderson, McAlister, McNichols, Frizzell, and the plaintiff, to Loughmiller & Co., which wheat was, by permission of the owners, shipped to the defendant, at Oregon City, for storage in its warehouse. Loughmiller & Co. failed, and the firm was unable to replace the wheat or to pay for it. The claims of the respective parties having been assigned to the plaintiff, the latter commenced this action to recover the value of the wheat, on the theory that Loughmiller & Co., in receiving and shipping it, were acting for and as the agents of the defendant, and that it was therefore liable for their contracts. The complaint contained six causes of action,

which were the same, except as to names, dates, and amounts. The answer denied the receipt of the wheat as alleged in the complaint, and the contract set out therein. An affirmative defense was also set up, alleging, among other things, an agreement entered into by the defendant company with Loughmiller & Co., respecting their dealings in wheat, in which it was expressly understood and agreed that the defendant was to deal solely and entirely with Loughmiller & Co., and that they were not to be, in any respect, the agents of the defendant in such transactions, or for any purpose whatever. The answer further averred that if any of the wheat received by the company came from, or originally belonged to, the plaintiff, or any of his alleged assignors, it had no notice or knowledge thereof. The allegations of the answer were put in issue by a reply. There was a judgment for the plaintiff, and the defendant appealed, assigning as error the admission of certain testimony, and the overruling of its motion for a nonsuit.

Williams, Wood & Linthicum, George H. Williams, and Stewart B. Linthicum, for the appellant.

William Wallace Thayer and William H. Holmes, for the respondent.

⁴⁸⁶ BEAN, J. 1. To support the first, third, and sixth causes of action, the plaintiff introduced in evidence five warehouse receipts, dated at Silverton, Oregon, and signed by W. E. Loughmiller & Co., and was permitted, over defendant's objection and exception, to give evidence aliunde the receipts, tending to prove that Loughmiller & Co., in signing and issuing them, were acting as the agents of defendant, and that such receipts were in fact the contracts of the defendant. The admission of this evidence constitutes the first assignment of error upon which the defendant relies for a reversal of the judgment. The wheat receipts referred to are identical, except as to dates, names, and amounts, and it will be sufficient for the purposes of this appeal to set forth one of them. It is as follows:

"No. 1. Silverton, Or., Sept. 7, 1891.

"Received from John Gash one thousand two hundred and ninety-four 40-60 bushels of good, merchantable wheat, to be forwarded to Oregon City, Oregon, and stored with the Portland Flouring Mills Co., subject to ⁴⁸⁷ the following conditions: W. E. Loughmiller & Co. are to have the first privilege of purchasing this wheat for cash at any time the storer con-

cludes to sell, and said wheat is subject to storage charges of two and one-half cents per bushel, and freight charges from shipping [point] to Oregon City. Upon demand, this quantity of good, merchantable wheat will be delivered to the storer, sacked, upon the payment of the above-mentioned storage and freight charges, and four cents per bushel for sacks; but no order of storer will be accepted by the Portland Flouring Mills Co. unless countersigned by W. E. Loughmiller & Co. But in no case shall W. E. Loughmiller & Co., or the Portland Flouring Mills Co., be held liable for accidental loss or damage to said wheat by the action of the elements.

“W. E. LOUGHMILLER & CO.

“Per J. A. L.

“1,294 40-60 bushels.”

1. The defendant's contention is that, since warehouse receipts in this state are by statute made negotiable, the rule of law that the liability of a party upon a negotiable instrument must be established by the terms of the writing itself, and cannot be shown by evidence aliunde, is applicable to such receipts. It may be regarded as a settled rule of the common law that, if the person sought to be charged upon a negotiable instrument is not bound upon the face of the writing, he is not bound at all, and it cannot be shown that the maker was in fact the agent of another, and that such other is bound by the instrument.

The observation of Andrews, J., in *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617, that “persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent,” is a clear statement of the law, and supported by ⁴⁸⁸ the authorities: *Chitty on Bills and Notes*, *33; *Heaton v. Myers*, 4 Colo. 59; *Arnold v. Sprague*, 34 Vt. 402; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Bedford Ins. Co. v. Covell*, 8 Met. 442; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421; *De Witt v. Walton*, 9 N. Y. 571; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829, 8 N. E. 583. But this rule is, in our opinion, confined to commercial contracts, which represent, and, in a measure, pass as money—such as bills of exchange and promissory notes. Parol evidence is not admissible to charge an unnamed principal on such an instrument; for, in the language of the authorities, a

note or bill of exchange "is a courier without luggage," whose countenance is its passport": 1 Daniel on Negotiable Instruments, 4th ed., sec. 303. And as said in an early case on the question: "It would be of dangerous consequence to trade to admit of evidence arising from extrinsic circumstances. . . . A bill of exchange is a contract, by the custom of merchants, and the whole of that contract must appear in writing": *Thomas v. Bishop*, 2 Strange, 955. Mr. Daniel, in the section already cited, says: "The rule excluding parol evidence to charge an unnamed principal as a party to negotiable paper is derived from the nature of such paper, which, being made for the purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the original party as the payee himself has, must indicate on its face who is bound for its payment; for any additional liability not expressed in the paper would not be negotiable." Section 4205 of Hill's Annotated Laws provides that "all checks or receipts given by any person operating any warehouse, commission house," etc., "are hereby declared negotiable, and may be transferred by indorsement of the party to whose order such check or receipt was given or issued, and such ⁴⁸⁹ indorsement shall be deemed a valid transfer of the commodity represented by such receipt, and may be made either in blank or to the order of another." By this statute, a warehouse receipt, regardless of its form, is made negotiable, in the sense that a transfer thereof by indorsement carries the absolute title to the commodity represented by the receipt, and a bona fide purchaser for value is not chargeable with knowledge of any notice of any equities between the original parties, as in case of the assignment of an ordinary chose in action: *State v. Koshland*, 25 Or. 178, 35 Pac. 32; *Bishop v. Fullkerth*, 68 Cal. 607, 10 Pac. 122; *Price v. Wisconsin Fire Ins. Co.*, 43 Wis. 267; *First Nat. Bank v. Dean*, 137 N. Y. 110, 32 N. E. 1108; *First Nat. Bank v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198; *Collins v. Rosenham*, 19 Ky. Law Rep. 1445, 43 S. W. 726.

2. But the statute does not give to such receipts all the attributes of negotiable paper. A transfer of the receipt by indorsement may operate, under the statute, to transfer and vest the title of the goods in the purchaser, where before it would not, but the nature of the contract itself is unchanged. It is in no sense a negotiable instrument under the law merchant. It is simply a written acknowledgment by the warehouseman that he has received, and holds in store for the depositor, the

amount and description of property named in the receipt, upon the terms and conditions therein stated, and is nothing more than a written contract between the parties, which by the statute is made negotiable for certain purposes. The word "negotiable" is evidently not used in the statute in the sense in which it is ordinarily applied to bills of exchange and promissory notes.

A very satisfactory case upon this subject is *Shaw v. Railroad Co.*, 101 U. S. 557. In that case the question was as to the right of a purchaser from a thief, for value, and without notice, of a bill of lading issued in Missouri ⁴⁹⁰ for goods to be carried to Pennsylvania, and which by the statutes of both states was made negotiable. In considering the question, it did not appear necessary to inquire whether the statute of Missouri or of Pennsylvania should be regarded as affecting the contract, since, in the opinion of the court, there was no substantial difference between the statutes of the two states in that regard. The language of the Pennsylvania statute was, they (bills of lading) "shall be negotiable and may be transferred by indorsement and delivery," while that of Missouri was, "they shall be negotiable by written indorsement thereon and delivery in the same manner as bills of exchange and promissory notes." But neither statute undertook to define the effect of such a transfer, and it therefore became necessary for the court to look outside of them to learn what the legislature meant by declaring such instruments "negotiable." After defining that term, as applied to contracts, to mean primarily the capability of being transferred by indorsement and delivery, so as to give to the indorsee a right to sue thereon in his own name, and pointing out that certain consequences generally, though not always, follow the indorsement or transfer of bills and notes—such as the liability of an indorser and the rights of a bona fide purchaser before maturity and from a finder or thief—it says: "But none of these consequences are necessary attendants or constituents of negotiability. That may exist without them. A bill or note past due is negotiable, if it be payable to order or bearer, but its indorsement or delivery does not cut off the defenses of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner. It does not necessarily follow, therefore, that, because a statute has made bills of lading negotiable by indorsement and delivery, ⁴⁹¹ all these consequences of an

indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation."

Again, after observing that bills of exchange and promissory notes are exceptional in their character, pass from hand to hand as coin, and the interests of trade require that a bona fide purchaser for value should not be bound to look beyond the instrument, the court proceeds: "The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for the transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it—a representative of those goods. But, if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. . . . Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation ⁴⁹² of bills and notes. Some of these consequences would be very strange, if not impossible; such as the liability of indorsers, the duty of demand ad diem, notice of nondelivery by the carrier, etc., or loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement."

We are of the opinion, therefore, that a warehouse receipt is not negotiable, within the meaning of the rule prohibiting the admission of parol testimony to charge one not bound upon the face of the instrument, but in that respect it is a simple contract, and such evidence is admissible to show that, although ex-

cuted by and in the name of an agent, it is in fact the contract of the principal, and he is bound thereby: *Barbre v. Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378.

It is contended, however, that, even if the receipts are not negotiable, they are nevertheless presumptively the contract of Loughmiller & Co. alone, and plaintiff cannot recover upon either the first, third, or sixth cause of action, for the reason that there was no evidence to rebut such presumption, or to show that Loughmiller & Co. were in fact defendant's agents. A considerable portion of defendant's brief is devoted to the discussion of this question, which we regard, however, as one of fact for the jury, and not the court. There was evidence given at the trial on behalf of plaintiff, tending to show, and from which the jury were justified in finding, that Loughmiller & Co. were in fact the agents of defendant, and received the wheat and executed the receipts as such. It is unnecessary for us to encumber this opinion by a reference to the testimony in detail. It is sufficient to say that we have examined it with much care, and are satisfied ⁴⁹³ that the court committed no error in overruling the motion for nonsuit on this ground.

It is next claimed that plaintiff cannot recover upon the second, fourth, and fifth causes of action—those representing the claims of Frizzell, McNichols, and McAlister—because of a failure of proof. The evidence offered to establish these several causes of action consisted of load checks, and the oral testimony of witnesses that the wheat was received upon the same terms and conditions, and under the same contract, as that of the other parties. The load checks are all substantially the same. The following may serve as a specimen:

"No. 56. Aug. 23. ———, Or., ———, 1893.

"Received by R. T. McNickle, by W. E. Loughmiller & Co., for the Portland Flouring Mills Co., ——— bushels, 3,835 lbs., good merchantable wheat, to be forwarded to Oregon City, and there stored in the P. F. M. Co.'s warehouses for the benefit of the owner. No. of sacks returned, 20 sacks.

"W. E. LOUGHMILLER,
"Weigher."

It is claimed that these load checks constitute the contract under which the wheat was received by Loughmiller & Co., and that they do not support the allegations of the complaint. But the evidence shows that when a farmer delivered a load of grain it was the custom to give him a load check as an evidence

thereof, and when he completed his season's hauling a receipt was issued for the entire amount of grain delivered, in form the same as the one heretofore set out, and hence the load checks do not evidence the contract under which the wheat was received, but are simply memoranda of each load of wheat as it was delivered; and so parol evidence to the effect that the wheat represented in the second, fourth, and fifth ~~494~~ causes of action was delivered and received under the same contract as in the case of the other parties was competent.

Next it is claimed that plaintiff cannot recover upon any of the causes of action, because, if defendant is under any liability to plaintiff, it is in tort, and not contract. This contention is based upon the theory that Loughmiller & Co. were not the agents of defendant. But, as we have already seen, there was, in our opinion, sufficient evidence to carry that question to the jury, and hence this position is without merit.

3. It is next contended that the payment or tender of storage, freight, and sack charges was a condition precedent to the right to maintain this action, and the written tender was not sufficient, but the money should have been paid into court. The defendant, by its answer, denies the contract alleged in the complaint, and the plaintiff's title and right to the possession of the wheat in controversy, and expressly puts its refusal to deliver upon the ground that neither plaintiff nor his assignors ever shipped or delivered to it any wheat whatever; and therefore it cannot now be permitted to say that its refusal to deliver the grain was on account of the failure of plaintiff to pay the charges referred to: *Wyatt v. Henderson*, 31 Or. 48, 48 Pac. 790. This disposes of all the questions raised on the appeal, and, finding no error in the record, the judgment is affirmed.

WAREHOUSE RECEIPTS—NEGOTIABILITY.—In the absence of a statutory provision, warehouse receipts are not negotiable: *Notes to Commercial Bank v. Hurt*, 42 Am. St. Rep. 48; *Rice v. Cutler*, 84 Am. Dec. 753; and though they are made negotiable by statute (*Hanover Nat. Bank v. American Dock etc. Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72; *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918), they seem not to possess negotiability in the full sense of that term: *Commercial Bank v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38, 12 South. 568.

ABRAHAM v. OREGON AND CALIFORNIA R. R. CO.

[37 Or. 495, 60 Pac. 899.]

PAROL EVIDENCE IS NOT ADMISSIBLE TO SHOW MEANING OR UNDERSTANDING OF COMMON WORDS.—It is not competent for either of the parties to a contract, where the language is plain and unambiguous, to prove by parol evidence how it was understood, or the meaning of the words used.

PAROL EVIDENCE IS NOT ADMISSIBLE TO EXPLAIN THE WORDS "LEGITIMATE RAILROAD PURPOSES."—If land is conveyed to a railroad company "for all legitimate railroad, depot, and warehouse purposes," parol evidence is not admissible to show that the words "legitimate railroad purposes" were used with a special meaning, and that the deed to the company was not intended to, and did not, convey to it the right to use the property for all legitimate railroad purposes.

RAILROAD PURPOSES—HOTEL OR EATING-HOUSE.—Whether a certain hotel or eating-house is maintained for railroad purposes is largely a mixed question of law and fact, to be determined from the circumstances of each particular case. If it appears to be reasonably necessary for the convenience of the employees and passengers of the railway company, its maintenance is a legitimate railroad purpose; but if it is kept for the accommodation of the general public, and not as an incident to the operation and management of the railway, it cannot be so considered.

Suit by Abraham against the defendant railroad company and others to enjoin the maintenance of a hotel, and diversion of water, and for damages. The plaintiff and W. R. Willis had conveyed to the company certain land for the purpose of building and maintaining a railroad thereon, and to use the same "for all legitimate railroad, depot, and warehouse purposes." The land granted was at Glendale, and adjoining it was a large tract owned by the plaintiff and Willis, which they subsequently laid off and platted as a town. The plaintiff, having succeeded to Willis' interest, built a hotel on his land. The railroad company thereafter leased the land granted to it to the Southern Pacific Company, which latter company leased a portion of it to the defendant Clarke, who erected thereon a hotel, which rendered the plaintiff's hotel practically valueless for the purposes for which it was erected. It was averred that, at the time of the execution of the deed, it was understood and agreed as stated in the opinion. The plaintiff's second cause of action was for the alleged violation of a contract, by the Southern Pacific Company and Clarke, in taking water from a water tank, and conducting it to the hotel built by Clarke, in viola-

tion of the plaintiff's rights. A demurrer to the complaint was sustained and the plaintiff appealed.

Dolph, Mallory & Simon, Albert Abraham, and J. C. Fullerton, for the appellant.

Fenton, Bronaugh & Muir, Willis & Rice, and William T. Muir, for the respondents.

⁴⁹⁹ BEAN, J. This is not a suit to correct or reform a deed, and hence there are but two questions for decision on this appeal: 1. Whether, under the allegation that, at the time the deed was made by the plaintiff and Willis to the Oregon and California Railroad Company, it was understood and agreed that the words "for all legitimate railroad, depot, and warehouse purposes" should not mean or include a hotel or eating-house, plaintiff is entitled to an injunction restraining the defendants from maintaining a hotel on the premises conveyed, because in violation of the terms of the grant; and 2. If not, whether the hotel constructed and now maintained by the defendants the Southern Pacific Company and Clarke is for "legitimate railroad purposes." Considerable discussion was had at the argument as to whether the deed in question conveyed to the railroad company the fee of the land therein described, or a mere easement therein. But, for the purposes of this appeal, that question is immaterial. In any event, the grant was for legitimate railroad, depot, and warehouse purposes only: *Breckinridge v. Delaware etc. R. R. Co.* (N. J. Eq.), 33 Atl. 800; *Robinson v. Missisquoi R. R. Co.*, 59 Vt. 426, 10 Atl. 522; *Thornton v. Trammell*, 39 Ga. 202.

1. We come, then, directly to a consideration of the question as to whether parol evidence is admissible to show that the words "legitimate railroad purposes" were used in the deed in a particular sense. It is an ⁵⁰⁰ elementary rule of law that parol evidence cannot be admitted to contradict or vary a written instrument; and it is equally well settled that parol evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used. Mr. Greenleaf, after stating the rule that parol evidence is always receivable to define and explain the meaning of words in a contract which are purely technical or local, or which have two meanings—the one common and universal, and the other technical or local—or where words and phrases are used in a

peculiar sense by members of a particular religious sect, says: "But beyond this the principle does not extend. If, therefore, a contract is made in ordinary and popular language, to which no local or technical and peculiar meaning is attached, parol evidence, it seems, is not admissible to show that in that particular case the words were used in any other than their ordinary and popular sense": 1 Greenleaf on Evidence, 15th ed., sec. 295.

And Lord Chief Justice Tindall says: "The general rule I take to be that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves, and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention ⁵⁰¹ of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself": Shore v. Wilson, 9 Clarke & F. *355, *565. And Mr. Justice Clifford, in Moran v. Prather, 23 Wall. 492, 501, speaking in reference to the same subject, says: "Ambiguous words or phrases may be reasonably construed to affect the intention of the parties, but the province of construction, except when technical terms are employed, can never extend beyond the language employed, the subject matter, and the surrounding circumstances." It is, therefore, not competent for either of the parties to a contract, where its language is plain and unambiguous, to prove by parol evidence how it was understood, or the meaning of the words used: 1 Rice on Evidence, 250; Kemble v. Lull, 3 McLean, 272, Fed. Cas. No. 7683; Davis v. Shafer, 50 Fed. 764. Applying this rule to the case in hand, it is clear that the plaintiff cannot show by parol testimony that the deed from himself and Willis to the railroad company was

not intended to, and did not, convey to such company the right to use the property for all legitimate railroad purposes.

2. It is claimed, however, on behalf of the plaintiff, that the hotel is not a legitimate or proper railroad purpose, because it is used for the accommodation of the general public, and not for the passengers and employes of the railroad company. The erection and maintenance ⁵⁰² by railway companies of hotels or eating stations at suitable and convenient places along their roads for the use and accommodation of their employes and passengers is not only a legitimate and proper railroad use, but almost, if not quite, a necessity, in many instances, of modern railway travel. A railway company has an undoubted right to use its property in any way the exigencies of its business or the convenience or accommodation of its passengers may require or suggest: *Gudger v. Richmond etc. Ry. Co.*, 106 N. C. 481, 11 S. E. 515; *Western Union Tel. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *Gurney v. Minneapolis etc. Elev. Co.*, 63 Minn. 70, 65 N. W. 136; *Illinois etc. R. R. Co. v. Wathen*, 17 Ill. App. 582. And, in cases where hotels or eating-houses appear to be reasonably necessary for the convenience of its employes and passengers, their maintenance is a legitimate railroad purpose. But an eating-house or hotel kept for the accommodation of the general public, and not as an incident to the operation and management of the railway, cannot be so considered. As to whether a given hotel or eating-house is maintained for railroad purposes is, therefore, largely a mixed question of law and fact, to be determined from the circumstances of each particular case. The question as to when and under what circumstances a hotel is a necessary or legitimate railroad use or purpose is quite fully considered in *Milwaukee etc. Ry. Co. v. Board of Supervisors etc.*, 29 Wis. 116; *Milwaukee etc. Ry. Co. v. Milwaukee*, 34 Wis. 271; *Chicago etc. Ry. Co. v. Board of Supervisors etc.*, 48 Wis. 666, 5 N. W. 3; and, within the doctrine of these cases, we are of the opinion that, under the allegations of the complaint, the operation of the hotel in question cannot be held, as a matter of law, to be a "legitimate railroad purpose," and within the terms of the grant from ⁵⁰³ the plaintiff, because it is alleged that it is not necessary, and does not add to the comfort, convenience, or safety of the railway passengers, but is for the accommodation of the general public. It seems to us, therefore, the demurrer should be overruled, and the case tried upon its merits, so that

the court, aided by the testimony, can determine whether the hotel is in fact a legitimate railroad purpose.

But little need be said in reference to the second cause of suit. The complaint does not show any injury to the plaintiff by the alleged violation of the contract pleaded. It is nowhere alleged that he ever attempted to avail himself of the right given by the contract, although a period of sixteen years has elapsed since its execution; nor is it averred that he has any use for the water, or is damaged or injured in any way by its alleged diversion. It follows that the decree of the court below must be reversed, the demurrer overruled, and the cause remanded for further proceedings consistent with this opinion, and it is so ordered.

ORAL EVIDENCE AS TO THE MEANING of a contract is inadmissible, where there is no ambiguity respecting its meaning as shown on its face: *Peet v. Chicago etc. Ry. Co.*, 20 Wis. 594, 91 Am. Dec. 446.

A RAILROAD CORPORATION HAS POWER to carry on its legitimate business by all legal and necessary means not prohibited by law or its charter: *Philadelphia etc. R. R. Co. v. Lewis*, 83 Pa. St. 33, 75 Am. Dec. 574.

EWING v. RHEA.

[87 Or. 583, 62 Pac. 790.]

LICENSE—WHEN REVOCABLE.—A mere naked license by acquiescence, unless enjoyed for such a time as to bar the statute of limitations, may be revoked at any time at the pleasure of the licensor.

LICENSE—WHAT WILL NOT RENDER IRREVOCABLE.
A mere naked license, predicated upon an invasion of another's right, and which is in effect a trespass upon his property, does not so encourage a party to act upon the faith of the implied permission as to render it irrevocable, even when money has been expended in improving the property, under a belief that the uninvited use relied upon will never be interrupted.

LICENSE TO CONSTRUCT DITCH—WHEN REVOCABLE.
A mere naked license by acquiescence, whereby the defendant's grantors permitted the plaintiff to construct an irrigating ditch across their lands, at considerable expense, may be revoked and the supply of water cut off by the defendant, at any time before the statute of limitations has run.

Suit by Ewing against Rhea to enjoin interference with an irrigating ditch. The plaintiff was in possession of certain arid

lands, to which he had constructed a ditch, running across land belonging to the defendant's grantors. He used the water for irrigating purposes. The defendant's grantors knew of, and acquiesced in, the construction of the ditch, and stood by and saw the plaintiff expend large sums of money in constructing the ditch and in improving his premises. The defendant, prior to securing a deed to a portion of his land, also knew of the situation, but he subsequently destroyed a portion of the plaintiff's ditch, thereby depriving him of the use of the water. The court sustained a demurrer to the complaint, the suit was dismissed, and the plaintiff appealed.

S. A. D. Gurley, for the appellant.

C. E. Redfield, for the respondent.

⁵⁸⁴ MOORE, J. The question to be considered is whether a complaint alleging a passive acquiescence by defendant's predecessors, when they knew that plaintiff was expending large sums of money in making valuable improvements upon his land while relying upon the faith of the implied license to maintain said ditch, which, if revocable, would render such improvements valueless, states facts sufficient to constitute a cause of suit. Plaintiff's counsel contends that the complaint is sufficient in this respect, and that the court erred in sustaining the demurrer, and relies upon the case of *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378, in which it appears that in 1865 the company's predecessor, with the consent and assistance of one Green Arnold, built a dam across a creek, and laid a pipe therefrom, by which water ⁵⁸⁵ was diverted and conducted to the city of La Grande for the use of its inhabitants. Mrs. Curtis, the plaintiff therein, in 1876 acquired by mesne conveyances from Arnold the title to a tract of land through which said creek flowed, and in 1887 the company, without her express consent, built a new dam across the creek about one thousand feet above the old one, and, taking up the conduit, relaid it from the new dam, and resumed the supply of water thereby. Mrs. Curtis having instituted a suit to enjoin the diversion, it appeared at the trial that the company changed the point of diversion under a claim to the use of the water which it believed was well founded; that Mrs. Curtis, with knowledge of such claim, stood by without asserting any right to have the undiminished flow of the stream continue in the natural channel until she had seen the company expend large

sums of money in improving its property, which, without the use of the water at the new point of diversion, would be rendered valueless, whereupon it was held that by her passive acquiescence she was estopped from asserting any right to the uninterrupted flow of the water in the creek. In *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10, it was held that the evidence of an irrevocable license should be clear and convincing, and show a permission to do the particular act performed, or some participation in its execution by the alleged licensor. In *Lavery v. Arnold*, 36 Or. 84, 57 Pac. 906, it was held that a passive acquiescence was insufficient to create an estoppel, the court saying: "But such license must result from some consideration paid by the licensee, or some benefit accruing to the licensor; otherwise, a person entitled to the use of water might be deprived thereof by seeing a neighbor constructing a ditch, making no objection thereto until the water was diverted, under an honest belief that he intended to use only the surplus."

So, too, in *Hallock v. Suitor*, 37 Or. 9, 60 Pac. 384, it ⁵⁸⁶ was held that a riparian owner upon a stream who made no objection when informed by a lower riparian proprietor that he intended to build a dam on her land was not estopped by any failure to assert her right, and that such passive acquiescence was not equivalent to a license to construct the dam. A license of this character is an authority to do some act or series of acts on the land of another for the benefit of the licensee without passing any estate in the land: *Christensen v. Pacific Coast Borax Co.*, 26 Or. 302, 38 Pac. 127; *Stinson v. Hardy*, 27 Or. 584, 41 Pac. 116. "A license," says Mr. Justice Lord, in *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378, "creates no interest in land. It is founded on personal confidence, and is not assignable; and its continuance depends on the pleasure of the party giving it, and is revocable unless executed under such circumstances as would authorize the interference of equity to prevent injustice." The rule is well settled in this state that if a party has paid a consideration therefor, or been encouraged by any participation in a common enterprise, or induced by a definite oral agreement to expend money in making permanent valuable improvements, the parol license upon the faith of which he has acted in executing it cannot be revoked to his prejudice: *Coffman v. Robbins*, 8 Or. 279; *Huston v. Bybee*, 17 Or. 140, 20 Pac. 51; *Combs v. Slayton*, 19 Or. 99, 26 Pac. 661; *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378; *Baldock v.*

and his continued drinking up to the killing, as consistent with the view that he had formed a design to kill and was nerving himself up to its execution.

HOMICIDE—EVIDENCE—INTOXICATION.—If, on a trial for murder, the defense has introduced evidence of the intoxication of the accused, the prosecution may, in rebuttal, show his condition as to sobriety previous to the killing, although the defense has already given the same, or closely similar, evidence on the same point.

C. Burleigh and D. F. Patterson, for the appellant.

J. C. Haymaker, district attorney, for the appellee.

⁵⁹ MITCHELL, J. Appellant, at about 5 o'clock in the afternoon, went to the house of Rudge, asked for him, and on his coming to the door, after a very brief conversation, without any altercation whatever, drew a revolver and shot him. These facts were not only proved by the commonwealth, but testified to by the appellant himself on the witness stand. If anything can ever be said to be admitted at a trial, these facts were admitted in this case.

The commonwealth then proved that appellant had been employed by a coal mining company, but had not been working for several weeks on account of a broken arm; that Rudge was his foreman while at that work; and that appellant had sought Rudge earlier in the day, with the object of getting back his job. The prosecution then gave evidence of threats on the same day by appellant to shoot Rudge if he did not get his job back; of two efforts to borrow a revolver, and finally the purchase of one, and within a few minutes thereafter the killing with it. On this evidence the commonwealth pressed for a verdict of murder of the first degree.

The defense was intoxication, and in support of it testimony was given of the quantity of whisky drunk by appellant on that day and its effect upon him.

This was practically the whole case. On the undisputed facts it was murder, and the only real issue was the degree of the crime under our statute.

The main burden of the assignments of error is that the judge several times referred to the "admissions of counsel" that defendant was guilty of "at least murder of the second degree"; and a very earnest argument is presented: 1. That no such admissions were made; 2. That even if they had been made, the jury could not find a verdict on them, but must base it exclusively on the evidence.

The admissions to which the judge referred were admissions of facts from which the law drew the inexorable conclusion of murder. This is apparent at every point in the charge where reference is made to admissions. It is perhaps most concisely ⁶⁰ expressed in the part complained of in the sixth assignment: "You will perceive that we have that which demands and requires the admission of counsel for the defendant that this man is guilty of at least murder of the second degree." That is, there were the facts proved by the commonwealth, undisputed, conceded, admitted, and sworn to by defendant himself, from which the law sanctioned but one conclusion, that the prisoner was guilty of at least murder of the second degree. The distinction sought to be set up between an admission of guilt "at least" and "at most" of second degree has no substance. The legal inference from the facts being murder, it must be "at least" of the second degree for that is the lowest grade. The facts as stated by defendant conclusively negated all idea of manslaughter, and there was no evidence on which counsel could found any claim that the jury had the right (though they might have the power) to render such a verdict. The direction of the bullet was not even a scintilla of evidence of a struggle in opposition to the direct testimony to the contrary by prisoner himself and his victim's wife. The charge of the judge on that subject was a correct statement of the law, and to the extent that it seemed to countenance the possibility of a verdict of manslaughter was more favorable to the prisoner than he could have demanded. It would not have been error to omit it entirely: *Commonwealth v. Sheets*, 197 Pa. St. 69, 46 Atl. 753. But there being nothing on which a claim for a verdict of manslaughter could be sustained, there could have been no admission "at most" of second degree. That was not a subject of admission by the prisoner or his counsel, because guilt "at most" would be murder of the first degree, for which the commonwealth was contending and which the prisoner was resisting. His admission of the facts, therefore, was an admission of what the law conclusively said was "at least" murder of the second degree, and the judge was entirely accurate in so describing it.

The second branch of appellant's argument that admissions of counsel, even if made, could not be taken by the jury as the basis of a verdict is not tenable. The facts, as already said, were not only admitted but proved, but, even without this, admissions of fact are evidence. Greenleaf devotes two chapters

to this subject: 1 Greenleaf on Evidence, pt. 2, cc. 11, 12. Counsel represent their client, and their admissions are prima facie his admissions. Certainly so even in criminal cases when made in his presence and to the jury. "In trials for felony, admissions of fact which the government is bound to prove are not permitted unless made at the trial in open court by the prisoner or his counsel": 3 Greenleaf on Evidence, sec. 39.

The cases cited by appellant as to the fixing of the degree of the crime by the jury do not affect this case. In *Jones v. Commonwealth*, 75 Pa. St. 403, there was a plea of guilty, and the court below found the murder to have been of the first degree. This court regarding the proof of premeditation as not beyond reasonable doubt, reduced the judgment to the second degree. In *Rhodes v. Commonwealth*, 48 Pa. St. 396, and *Lane v. Commonwealth*, 59 Pa. St. 371, the court gave binding instructions that the verdict must be for first degree or not guilty. There was nothing of the kind in the present case. On the contrary, the jury were told in the most explicit terms that there were four verdicts, any one of which they might render, to wit, not guilty, or guilty of manslaughter, of murder of the second degree or of the first degree, and in the choice among these four they were left entirely free to exercise their own judgment.

Appellant further complains that his sixth, ninth, tenth, and eleventh points were affirmed, but with qualifications which lessened their force. There is no merit in this claim. A judge is not bound to charge the jury in the exact language of the point, but may choose his own words, and if the point affirmed without qualification would be likely to give the jury an erroneous impression, it is his duty to add such explanations or qualifications as will correct such tendency. "Points even though taken verbatim from the decisions of this court cannot always be properly answered by a simple affirmation. However accurately and carefully stated in their connection and applied to the case under discussion, they may, when taken as detached sentences and applied to different circumstances, convey erroneous ideas, especially to unlearned jurors": *Commonwealth v. McManus*, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761. See, also, *Kroegher v. McConway etc. Co.*, 149 Pa. St. 444, 23 Atl. 341; *Walbert v. Trexler*, 156 Pa. St. 112, 27 Atl. 65; *Cosgrove v. Cummings*, 190 Pa. St. 525, 42 Atl. 881; *Carey v. Buckley*, 192 Pa. St. 276, 43 Atl. 1019. The appellant's points on the

subject of intoxication might have tended to lead or confirm the jury in the popular error that a drunken man is not responsible for crime. In view of this tendency, the ⁶² qualifications added by the judge were entirely correct and appropriate. They put before the jury the exact bearing and limits of the points as rules of law. The threats by the prisoner, his repeatedly seeking the deceased, and his continued drinking up to the killing, were consistent with the view that he had formed the design to kill and was nerving himself up to its execution. This was the claim of the commonwealth, and it was proper that the judge should present it with the others to the jury.

The remaining assignment of error to the admission in rebuttal of the commonwealth's testimony as to the prisoner's condition of sobriety previous to the killing cannot be sustained. The degree of the prisoner's intoxication at the time and shortly previous to the killing was the hinge of the case, and the commonwealth could not be prevented from showing it in her own way, though the defense may have already given the same or closely similar evidence on the same point.

We find no error in the charge. It was a careful presentation of the whole case in its several aspects. It stated the law clearly and accurately in terms tending, it is true, to lead the jury to do their duty in the impartial and unflinching administration of justice, and for that it is to be commended. But it left them distinctly free to exercise all their powers upon their own judgment, and infringed no right nor overlooked any safeguard for the prisoner. The result was not due to the judge but to the relentless logic of the facts.

The judgment is affirmed and the record remitted to the court below for purposes of execution.

EVIDENCE — ADMISSIONS OF COUNSEL.—A defendant is bound by admissions of his counsel: *Pratt v. Conway*, 148 Mo. 291, 71 Am. St. Rep. 602, 49 S. W. 1028. But such admissions at one trial are not admissible against the client in another suit: *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

INSTRUCTIONS—LANGUAGE OF REQUEST.—The court is not compelled to charge the jury in the exact language of the request: *Wade v. Columbia Electric etc. Co.*, 51 S. C. 296, 64 Am. St. Rep. 676, 29 S. E. 233.

SPEES v. BOGGS.

[198 Pa. St. 112, 47 Atl. 875.]

NEGLIGENCE—PRESUMPTION OF FROM ELEVATOR ACCIDENT.—The mere happening of an elevator accident does not raise the presumption of negligence in its operation, or that the machinery was unsafe or defective.

NEGLIGENCE—BURDEN OF PROOF.—If recovery is sought on the ground of the negligence of the defendant, the burden of proof is on the plaintiff, except in cases of common carriers. In actions against employers, some specific act of negligence must be alleged and proved.

MASTER AND SERVANT—FELLOW-SERVANTS.—A person employed to work in the tailoring department of a drygoods store, and another person employed to run an elevator set apart for the use of employes in going to and from their work, and in going from one floor to another, as their duties require, are fellow-servants.

MASTER AND SERVANT—FELLOW-SERVANTS.—Persons in the employ of the same master, engaged in the same common work, and performing duties and services for the same general purpose, are fellow-servants. They need not be engaged in the same particular work.

E. S. Craig, for the appellants.

S. Schoyer, Jr., S. B. Schoyer, and W. L. Kaufman, for the appellee.

¹¹⁴ **FELL, J.** The plaintiff, while in the employ of the defendants, was injured while riding in a passenger elevator provided for the use of employes in their store. The elevator did not fall. It appeared from the undisputed testimony that nothing connected with it broke or was out of repair. For some reason, wholly unexplained, the boy in charge of the elevator failed to stop it at the first floor, and it passed without any slackening of its speed to the basement of the building, where it struck ¹¹⁵ the floor with considerable force. The elevator was inspected regularly once a week, and it had been inspected a few hours before the accident and found to be in good condition. It was in good condition immediately after the accident. The plaintiff produced testimony to show that the elevator had failed to stop or had slipped at other times, but was unable to fix a time which was within a year of the accident, and the slipping at other times was not shown to have resulted from defective construction or from want of repair. The only prior time when there had been trouble with

the elevator which was fixed with any degree of certainty was a year before. The boy in charge was then cautioned by the manager of the store, and there had been no further difficulty in the management of the elevator until the happening of the accident in which the plaintiff was injured. After the accident a device which acted automatically to check the speed of the elevator if it became too great was so adjusted that the safety clutches would be thrown out six inches or a foot higher in the elevator shaft. The boy in charge of the elevator was eighteen years of age. He had been fully instructed in his duties and had operated the elevator three months. No question as to his competency was raised.

The safety device was intended to operate automatically in case of excessive speed of the elevator resulting from the breaking of the machinery or its failure to operate. It was not intended to check the usual speed of the elevator as it descended from floor to floor of the building, and that was the only speed in the case. The elevator did not stop at the first floor, but went on down to the basement with the same or possibly a slightly increased speed. The adjustment of the device after the accident to cause it to act under a less degree of speed may have been a wise precaution against the neglect of the operator, but it was not evidence of defective original construction or of want of proper inspection.

Under the facts developed at the trial, a verdict cannot be sustained against the defendants without making them insurers of the safety of their employés. The learned judge stated that there was no direct testimony that the elevator was in any way defective, but he placed on the defendants the burden of relieving themselves of the imputation of negligence by explaining the cause of the accident, and he made ¹¹⁶ them responsible for the negligence of the boy who operated the elevator, by instructing the jury that he and the plaintiff were not coemployés. In both of these rulings there was error. Even in exceptional cases where the conditions are so obviously dangerous as to give rise to an inference of negligence, the burden thrown on the defendant is not that of satisfactorily accounting for the accident, but that of showing that he used due care. In such cases negligence is not presumed, but the circumstances are held to be evidence from which the jury may infer negligence: *Stearns v. Ontario Spinning Co.*, 184 Pa. St. 519, 39 Atl. 292, 63 Am. St. Rep. 807; *East End Oil Co. v. Pennsylvania Torpedo Co.*, 190 Pa. St. 350, 42 Atl. 707.

The gist of the action was negligence, and the plaintiff, in order to recover, was required to prove it. The mere happening of the accident did not raise a presumption that the machinery was unsafe or defective. Except in the case of a carrier, the rule is uniform that where recovery is sought on the ground of negligence of the defendant, the burden of proof is on the plaintiff, and in an action against an employer some specific act of negligence must be shown: *Philadelphia etc. R. R. Co. v. Hughes*, 119 Pa. St. 301, 13 Atl. 286; *Pawling v. Hoskins*, 132 Pa. St. 617, 19 Am. St. Rep. 617, 19 Atl. 301; *Mixter v. Imperial Coal Co.*, 152 Pa. St. 395, 25 Atl. 587; *Wojciechowski v. Spreckels' Sugar Refining Co.*, 177 Pa. St. 57, 35 Atl. 596; *Higgins v. Fanning*, 195 Pa. St. 599, 46 Atl. 102. In *Mixter v. Imperial Coal Co.*, 152 Pa. St. 395, 25 Atl. 587, it was said: "The plaintiff was an employé of the defendant company, and was claiming to recover damages of his employer for personal injuries received in the course of his employment. We have many times held in such cases that the mere fact of the accident is not enough to establish negligence."

The plaintiff and the elevator boy were fellow-servants, within the rule that exempts the employer from liability. The former was employed to work in the tailoring department of a dry-goods store, and the latter to run an elevator which was set apart for the use of employés in going to and from their work and in going from one floor of the building to another as their duties required. They were employed by the same person, were under the same general control, and were engaged in the same general work. They come clearly within the definition of fellow-servants given in *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432, and repeated in *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246, 42 Am. Rep. 543, *New York etc. R. R. Co. v. Bell*, ¹¹⁷ 112 Pa. St. 400, 4 Atl. 50, *Duffy v. Oliver*, 131 Pa. St. 203, 18 Atl. 872, and other cases: "The question arises, Who are fellow-servants in contemplation of law? To constitute such they need not at the time be engaged in the same particular work. It is sufficient if they are in the employ of the same master, engaged in the same common work, and performing duties and services for the same general purpose."

The judgment is reversed.

FELLOW-SERVANTS, WHO ARE.—Employés serving a common master, engaged in a common pursuit, and in accomplishing the same common object, are fellow-servants: *New Pittsburgh etc. Coke Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 827, 85 N. E.

7. As to whether the operator or manager of an elevator is a fellow-servant with other employes in the building, see *Mann v. O'Sullivan*, 128 Cal. 61, 77 Am. St. Rep. 149, 58 Pac. 375; monographic note to *Mast v. Kern*, 75 Am. St. Rep. 611.

ELEVATOR ACCIDENT—PRESUMPTION.—In *Springer v. Ford*, 189 Ill. 430, ante, p. 464, 59 N. E. 953, it is held that where a passenger is injured by the breaking of an elevator, a presumption of negligence on the part of the owner arises.

ENRIGHT v. PITTSBURG JUNCTION RAILROAD CO.

[198 Pa. St. 166, 47 Atl. 938.]

NEGLIGENCE—TRESPASSERS.—A railroad company owes the duty of ordinary care to any person of any age who enters upon one of its trains as a trespasser. This is especially true of children of tender years.

NEGLIGENCE—TRESPASSING CHILD.—If a trespassing child of tender years on a freight train, frightened by the threatening acts of a brakeman, jumps from the train while it is in rapid motion, he may recover for injuries sustained thereby, as the company is guilty of negligence.

H. J. Miller and T. T. Donehoo, for the appellants.

J. McCleave, for the appellee.

¹⁶⁷ **MESTREZAT, J.** Joseph Enright, a boy of ten years, in company with two other boys, boarded a freight train on defendant's road while it was standing at the foot of Fortieth street in the city of Pittsburg on the afternoon of September 5, 1897. They got on a Pittsburg & Western iron flat-car, located about the ¹⁶⁸ middle of the train. A Baltimore & Ohio engine pulled the train and an engine of the defendant company pushed it. A brakeman saw the boys get on the train, but at that time did not offer to put them off. The destination of the boys was Schenley Park, to see the goat races. After the train had stopped at the foot of Fortieth street long enough to attach the pushing engine, it started south in the direction of the park. When it emerged from the tunnel at or near the park, Joseph's companions jumped off. The train then was going pretty fast, and for that reason the boy did not wish or intend to attempt to get off. At that time the brakeman, who was on the train and two cars from Joseph, waved a stick and hallooed at him, "Here comes the detective." The boy, being frightened by the conduct of the brakeman, left the car

on which he was riding and got on the bumper between it and the car next in front of it. After he did so the brakeman again waved his stick at him and hallooed, "Here comes a detective." The boy then, through fear, attempted to get off the train while it was moving rapidly, and, falling under the wheels of the car on which he had been riding, was seriously injured. His right leg was taken off and his left leg was badly lacerated.

Such, briefly stated, are the facts of this case as disclosed by the testimony. The learned judge of the court below granted a compulsory nonsuit, and subsequently refused to take it off, for the reason, as stated in his opinion, that "this case is ruled by the case of *Cauley v. Pittsburg etc. Ry. Co.*, 98 Pa. St. 498." We must, therefore, assume that the court below held that the action of the brakeman resulting in the injury of Joseph Enright was not negligence for which the defendant company was liable.

The liability of the defendant in this action depends upon the question whether it owed a duty of ordinary care and prudence to the plaintiff's son under the circumstances of the case and whether it exercised such duty. If no obligation of that character rested upon the defendant, then it is exonerated from any liability for the action of its employé in causing the boy to place himself in a perilous position which resulted in his injury.

The testimony, which we must assume to be true, establishes the fact that the boy was frightened by the brakeman so that ¹⁶⁹ he attempted to get off the train before he otherwise would have done so. The defendant's employé, therefore, while in the line of his duty, caused the boy to make an attempt to leave the train while it was moving rapidly. This act occasioned the injury to the plaintiff's son. Was it negligence? The solution of this question will determine the correctness of the judgment of the court below.

If the position assumed by the court and urged by the appellee's counsel be correct, then a railroad company owes no duty whatever to a person of any age who enters upon one of its trains as a trespasser. The company, under such circumstances, may with impunity at any time eject a person from a train at the peril of life and limb. Its employé may throw the trespasser from the train, though death necessarily results from his action. The child of tender years, whose discretion cannot protect him, as in this case, who has entered its train with the knowledge and without objection of the brakeman,

may be cast from the train with impunity while its rapid speed insures the greatest danger. Such is the logical conclusion from the ruling of the court below.

We cannot assent to a doctrine fraught with so much danger to the public and with so little regard for the rights of the individual. As said by Mr. Justice Gordon in *Biddle v. Hestonville etc. Ry. Co.*, 112 Pa. St. 551, 4 Atl. 485, it "would so illy accord with Christian civilization as to render its maintenance impossible." It cannot be supported by reason; it ignores a duty owed by a man to his fellow-man in civilized society; it repudiates an obligation resting alike upon the individual and the corporation.

The plaintiff's son was a trespasser upon the defendant's train. He had no right to be there, and the brakeman would have been justified in expelling him. The defendant owed no duty to carry him in safety to his destination or to surround him with safeguards to protect him from falling from the train while in motion. He was not a passenger nor entitled to protection as such. The defendant was not required to stop its train to permit him to alight, nor to run the train at any particular speed to suit the boy's convenience or for his safety. No duties of this character devolved upon it. But, conceding this to be true, it does not follow that the defendant, by its employes, ¹⁷⁰ could eject the boy from the train or cause him by fright or fear to leave the train while in rapid motion so as to endanger his life. The child being on the train and it running at a rapid speed, it became the duty of the defendant and its employes not to eject him. This duty arose from the circumstances. The failure to observe it was "a want of ordinary care under the circumstances," which is negligence. The brakeman knew the train was in motion, and hence saw the danger which must result from his conduct if the boy attempted to leave the train. His act was done, therefore, with full knowledge of the peril in which it placed the child. Consequently, the defendant, through its employé, disregarded a plain duty which resulted in the painful and serious injury of the plaintiff's son.

The simple proposition to be determined here is the right of the defendant by its employé to endanger the life of a child of tender years by compelling him to alight from a freight train while it is moving at a rapid speed. The boy was not injured by reason of the dangerous position in which he placed himself, but because of the careless and reckless act of the brakeman in

causing him to alight while the train was in motion. The cause of the boy's injury, therefore, is directly attributable to the negligent act of the defendant's employé in frightening him so that he attempted to quit the train in the face of imminent danger. We think the defendant company was negligent and should answer for its conduct.

This position is sustained by many decisions of this court. In *Biddle v. Hestonville etc. Ry. Co.*, 112 Pa. St. 551, 4 Atl. 485, Mr. Justice Gordon, delivering the opinion, says: "That the defendant's driver or conductor was grossly negligent in compelling a child of twelve years of age to jump, and that backward, from the platform of a moving car, no one can well deny. . . . It was a mistake to hold that because the child was a trespasser it could therefore be ejected in a manner which endangered its life or limbs. In the case of *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256, we held, per Mr. Justice Mercur, that such a disposition of a trespassing adult could not be allowed, and that ordinary care must be used to avoid injury even to a trespasser is fully established by the cases of *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33, *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, and *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 171 375, 84 Am. Dec. 457." In *Arnold v. Pennsylvania Ry. Co.*, 115 Pa. St. 140, 8 Atl. 213, it is said: "But the second rule to which we have adverted is that even a trespasser cannot be ejected from a train without a reasonable regard for his safety. This rule as stated by Mr. Justice Hunt, in the case of *Sioux City etc. R. R. Co. v. Stout*, 17 Wall. 657, is as follows: Whilst a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to a passenger, it is nevertheless not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts. And this same doctrine has been approved by our own authorities (citing them). If, then, we assume that the plaintiff was a trespasser, still the defendant had a duty to perform with reference to his safety which it was not at liberty to neglect; hence, the court erred in directing a nonsuit." In *Barre v. Reading City Pass. Ry. Co.*, 155 Pa. St. 173, 26 Atl. 99, the court says: "Assuming as a fact the defendant's allegation that plaintiff was a trespasser, that would not justify the driver in removing her from the rapidly moving car, so forcibly and with such utter disregard for her personal safety. If the testimony was believed—as it must have been—by the

jury, the driver was fully aware of the plaintiff's situation and how she was sustaining herself, and he could not have been ignorant of the fact that she was a child of tender years. Knowing all this, he was at least bound to exercise such care in putting her off as not to endanger her life or limbs. Even trespassers are entitled to humane consideration; but plaintiff's youth exempted her from the charge of being a trespasser in the legal significance of the word."

The learned counsel for the appellee contends that the facts of this case bring it within the decisions of the court in *Flower v. Pennsylvania Ry. Co.*, 69 Pa. St. 210, 8 Am. Rep. 251, *Baltimore etc. R. R. Co. v. Schwindling*, 101 Pa. St. 258, 47 Am. Rep. 706, and *Cauley v. Pittsburg etc. Ry. Co.*, 95 Pa. St. 398, 40 Am. Rep. 664. It is therefore necessary to refer to these cases briefly and see what they decide.

In *Flower v. Pennsylvania Ry. Co.*, 69 Pa. St. 210, 8 Am. Rep. 251, a boy, who was standing on the platform of a water-tank, was requested by the fireman, who was acting as temporary engineer, to put in the hose and turn the water on the engine-tank. He climbed up the side of the tender to put in the hose, and, as he did so, some detached freight-cars¹⁷² belonging to the train ran down without any brakeman and struck the car behind the tender, driving the tender and engine forward. The boy fell from the tender and was killed. In the opinion of the court, by Mr. Justice Agnew, it is said that the case turned "wholly on the effect of the request of the fireman, who was temporary engineer, to put in the hose and turn on the water." It was therefore held that, it not being in the scope of the engineer's or fireman's employment to ask anyone to come on the engine, the defendant was not liable. In *Baltimore etc. R. R. Co. v. Schwindling*, 101 Pa. St. 258, 47 Am. Rep. 706, a boy of five or six years went upon the platform of a railroad station for his own amusement, and while standing on the edge of the platform, looking at an approaching train, was struck and injured by an iron step which was bent and projected a few inches from the car of a passing train. The boy was told to step back from the position he occupied on the platform, but he refused to do so. Upon the authority of *Gillis v. Pennsylvania Ry. Co.*, 59 Pa. St. 141, 98 Am. Dec. 317, it was held that under these facts there could be no recovery, and that "the controlling feature of the inquiry in all such cases is, Was there a duty to the plaintiff which was vio-

lated by the defendant? If there was not there was no legal liability."

We think it apparent that the two cases just referred to do not sustain the contention of the appellee. The facts clearly distinguish them from the one at bar.

It must be conceded that *Cauley v. Pittsburg etc. Ry. Co.*, supports the position of the appellee. It was before the court twice and is reported in 95 Pa. St. 398, 40 Am. Rep. 664, and 98 Pa. St. 498. Both opinions were written by the same justice and from both judgments two justices dissented. The opinion in the first report of the case is broader and goes much further than the syllabus, in which there is nothing that conflicts with the views expressed in this opinion. The second opinion reiterates the views enunciated in the first opinion. We have examined carefully the decisions of this court cited in both opinions, and are convinced that they do not sustain the conclusion of the court on the facts disclosed in the *Cauley* case. We do not think the doctrine announced in the opinions filed in that case is supported by reason or authority, and in so far as it conflicts with the views herein expressed, the case is overruled.

¹⁷³ It follows that the learned judge of the court below was in error in withdrawing the case from the jury, and hence the assignments of error must be sustained.

The judgment is reversed and a procedendo awarded.

RAILROAD—TRESPASSER ON TRAIN.—It is the duty of a railway company and its employes not to injure a trespasser on a train willfully or intentionally: *Illinois Cent. R. R. Co. v. King*, 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 552. His forcible expulsion while the train is in rapid motion gives him a cause of action against the company for injuries sustained: *Savannah etc. Ry. Co. v. Godkin*, 104 Ga. 655, 69 Am. St. Rep. 187, 30 S. E. 378. See further, the recent cases of *Galveston etc. Ry. Co. v. Zantzinger*, 93 Tex. 64, 77 Am. St. Rep. 829, 53 S. W. 379; *Earl v. Chicago etc. Ry. Co.*, 109 Iowa, 14, 77 Am. St. Rep. 516, 79 N. W. 381. Where a boy boards a freight train to ride without paying fare, and a brakeman orders him to jump off while the train is moving rapidly, and he, in fear of being thrown off, jumps and is injured, the railway company is liable: *Kansas City etc. R. R. Co. v. Kelly*, 86 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172.

LIPPINCOTT v. SCOTT.

[198 Pa. St. 283, 47 Atl. 1115.]

BAILMENTS—CONDITIONAL SALE.—A lease of personal property for a term of years, in consideration of a fixed sum, to be paid in monthly installments, containing an agreement, in case of no default, to execute a bill of sale of the property, constitutes the agreement a bailment, and not a conditional sale.

Replevin to recover a soda water fountain founded on the following agreement:

“This agreement, made this thirteenth day of November, 1893, by and between Chas. Lippincott & Company, of Philadelphia, Pennsylvania, party of the first part, and D. C. Kuhn, Pittsburg, Pennsylvania, party of the second part.

“Witnesseth, That the party of the first part hereby leases and hires unto the said party of the second part the following soda water apparatus, bearing the name of Chas. Lippincott & Company as makers, and known as Style 1-36-15 Draught Hermosa Apparatus, and fixtures, for the term of thirty-seven months from the date thereof, reserving for the hire and use thereof for the said term the sum of four thousand dollars, payable as follows, viz., and the residue in monthly payments, as follows:

“One thousand dollars due January 1, 1894; eighty-four dollars per month for 12 months from February 1, 1894; eighty-three dollars per month for 24 months from February 1, 1895; during the term of this lease, 6 per cent interest.

“And the said lessee agrees as follows with the said party of the first part, to wit: That he will pay the unpaid hire as aforesaid, the several days as it becomes due; that he will take good care of said soda water apparatus, and will not, without the written consent of the party of the first part, sell or hire the same, or part with the possession thereof, or remove it from the premises now occupied by him at Pittsburg, Pennsylvania, until the conditions of this lease are fully complied with; that he will at any time, when required, exhibit the said soda water apparatus to the party of the first part or their agent; and in default of any monthly payment the said lessee agrees to re-deliver said soda water apparatus to the said Chas. Lippincott & Company, or their authorized agent, within five days after such payment shall become due, or permit their agent to enter into and upon any premises where said soda water apparatus

may be, and without let or hindrance take away the same, and further agrees to return said apparatus at the end of the term.

"The said party of the first part hereby agrees that if at the expiration of the term of this lease, the said lessee, his legal representatives or assigns, shall wish to purchase said soda water apparatus, the said Chas. Lippincott & Company will make and deliver to said lessee, or such representatives or assigns, a bill of sale thereof upon payment of such sum as will, with previous payments of hire, amount to the sum of four thousand dollars; but it is hereby expressly understood and agreed by and between the said parties to this agreement, that no title to the said soda water apparatus, either legal or equitable, shall vest in the said party of the second part, except as lessee under the agreement, until the terms of purchase, as above provided, have been complied with, and the aforesaid bill of sale has been duly delivered by the said party of the first part."

Judgment for the plaintiffs and defendant appealed.

F. C. McGirr and J. Marron, for the appellant.

L. L. Davis, for the appellees.

228 PER CURIAM. The appellant asserts that the principal question for consideration in this case is whether the agreement for the transfer of the soda water fountain was a bailment or a conditional sale. The jury found by their verdict that it was a bailment. If the verdict was warranted by the evidence and no error was committed in the instructions to the jury, the verdict and the judgment thereon must prevail against the appellant's claim. The written agreement of the parties appears on its face as a bailment. It is clearly within *Rowe v. Sharp*, 51 Pa. St. 26, *Enlow v. Klein*, 79 Pa. St. 488, *Brown v. Billington*, 163 Pa. St. 76, 43 Am. St. Rep. 780, 29 Atl. 904, and *Ditman v. Cottrell*, 125 Pa. St. 606, 17 Atl. 504. The effort of the appellant to make the agreement appear as a conditional sale has no material or satisfactory evidence to support it. As to the instructions complained of, it is sufficient to say that we have discovered no error, or anything of an unfair or partial nature in them.

Judgment affirmed.

SALE OR BAILMENT.—One who receives goods under an agreement, by which he is to keep them a certain period, and if he

pays for them, is to become the owner, but otherwise is to pay for the use of them, receives them as bailee only, and the property in them is not changed until the price is paid: *Brown v. Billington*, 163 Pa. St. 76, 43 Am. St. Rep. 780, 29 Atl. 904; note to *Bretz v. Diehl*, 2 Am. St. Rep. 713. But see the note to *Miller v. Steen*, 89 Am. Dec. 127-129.

COMMONWEALTH v. MAJOR.

[198 Pa. St. 290, 47 Atl. 741.]

HOMICIDE—EVIDENCE OF ANOTHER CRIME.—On the trial for the murder of a policeman, if it appears that the accused had threatened to kill the deceased, evidence of a burglary committed by the former at another place and prior to the killing, and connected with the threat, is admissible to show that the killing was intentional, willful, and premeditated, and also to show why the deceased was at the place of the killing.

HOMICIDE—EVIDENCE OF ANOTHER CRIME.—If, on a trial for the murder of a policeman, it appears that the accused, after committing a burglary at one place, went to another house, where he was engaged in committing a second burglary, at the time he shot the deceased, who had followed him from the scene of the first burglary, evidence of the second burglary is admissible, no matter whether the deceased knew of it or not.

HOMICIDE—EXECUTION OF COMMON PURPOSE.—If murder is the probable consequence of a crime in which the accused and his companions were engaged, the accused is chargeable with the killing, even though it was done by another in the execution of the common purpose.

INDICTMENT—TIME OF CRIME.—Except when time enters into the nature of an offense, it is not necessary to prove the exact time laid in the indictment. Any other time may be shown upon the trial, if it is prior to the finding of the indictment, and within the period prescribed by the statute of limitations.

HOMICIDE — INDICTMENT — TIME.—If an indictment charges murder on a day named, it may be shown that the deceased was shot on that day and that he died of the wound then received four days thereafter.

H. J. Humes, for the appellant.

W. R. Vance, district attorney, and C. W. Benedict, for the appellee.

POTTER, J. The appellant, Frank Major, together with one Frank Woodward, was charged with the murder of Daniel McGrath at the house of Bertha Bloom, on East Spring street, Titusville, Pennsylvania, in the early morning of November 11, 1899. Two days before, on November 9th, the two men above mentioned, together with a third, whose name

is unknown, came to Titusville in company, and remained almost continuously together until the commission of the crime. It appeared that about 3 o'clock in the morning of November 11th, the passenger station of the Dunkirk, Allegheny Valley, and Pittsburg railroads, at Titusville, was entered and the safe blown open; shortly after, the appellant, Frank Major, accompanied by Frank Woodward and the unknown man, who was afterward found dead in the vicinity, gained admittance to the Bloom house in Titusville. The man who was afterward found dead was identified by the night watchman at the railway station as one of the burglars. This man was placed on guard at the Bloom house, outside the door, while the other two went inside, and with revolvers in hand, ²⁹⁷ demanded money, jewelry, and other valuables, of the inmates. Several articles were obtained in this manner; but not being satisfied, Major and his companion demanded more money from Bertha Bloom, alleging that she had it concealed in a box, and threatening to burn her feet if she did not produce it. During the parley another inmate of the house called the attention of Major to the condition of his hands which were blackened and apparently smoked, and asked about them. Whereupon he told her that they had just come from the Dunkirk, Allegheny Valley, and Pittsburg railway station, where they had blown open the safe.

In the meantime the police officers, of whom Daniel McGrath was chief, had been notified of the burglary at the railway station, and had begun a search for the perpetrators, and had followed in pursuit of them to the house of Bertha Bloom. As the officers approached, the outside man gave the alarm and McGrath grappled with him at the door. Shooting began almost immediately, and according to the testimony, Major fired the first shot. McGrath and another policeman named Sheehy were badly wounded, and the parties separated without any arrests being made at that time. The next morning the man who had acted as outside guard was found dead near by. The appellant, Major, was arrested on the afternoon of the same day at a point several miles distant. Woodward escaped without arrest. The policeman, Sheehy, recovered from his injuries, but Daniel McGrath, chief of police, died from the effects of his wounds, on November 15th, some four days later.

Charged with his murder the appellant was tried, convicted, and sentenced in the court below. The case is now here upon

appeal, and industrious and painstaking counsel have assigned fifteen errors to the rulings of the trial judge.

All of the specifications may be grouped, as they were in the argument, into, first, those relating to the admission of testimony concerning the burglary at the railway station; second, those relating to the admission of testimony as to the perpetration of the robbery at the Bloom house; and lastly, one relating to the validity of the indictment, which charged the appellant with having killed McGrath upon November 11, 1899, whereas the evidence showed that while he was shot upon that day, he did not die for four days thereafter.

²⁹⁸ The evidence as to the burglary at the railway station was offered, not for the purpose of fixing the grade of the crime for which the prisoner was being tried, nor to show that he was likely to commit the offense charged; but because the burglary was connected with the threat made, and this testimony tended to show that the action was intentional, willful, and premeditated. The statements made by the appellant as to what had taken place at the depot and in explanation of the blackened condition of his hands, and his threats as to what he would do to McGrath, the chief of police, if he came to the Bloom house, were evidence of malice, and showed that the idea of murder was in his mind.

For these purposes the evidence was clearly admissible: *Goersen v. Commonwealth*, 99 Pa. St. 398; the evidence was also relevant for the purpose of explaining the presence and the action of the officers at the Bloom house at that time. According to the testimony, they had been notified of the burglary at the railway station, and went in immediate pursuit of the perpetrators, overtaking them at the Bloom house, where they were evidently not unexpected by Major and his confederates. The testimony is clearly within the rule permitting evidence of other offenses to be given. There was, therefore, no error in receiving the testimony relating to the burglary at the railway station.

As to the alleged errors set forth in the second class, being to the admission of testimony as to the perpetration of a robbery at the Bloom house at the time of the shooting, the objection is based chiefly upon the allegation that the officers were not aware, at the time, of the robbery of the inmates of the Bloom house, and that, therefore, all evidence thereof should have been excluded. The complaint is unwarranted. It was immaterial whether or not the officers were aware at the time

of the robbery then being committed at the Bloom house. They had followed in close pursuit from the scene of the burglary at the railway station; and when the officers came upon the burglars they were still within the house, and, having taken property from the inmates at intervals, continued to intimidate them up to the time of the homicide. The court could not say, as a matter of law, that the robbery had been completed, and was fully justified in submitting that question to the jury. The knowledge of the officers as to the fact of the robbery had no bearing upon the case. The law, in fixing the grade of the ~~rob~~ crime at murder in the first degree, if committed in the perpetration of, or attempt to perpetrate, robbery, necessarily contemplated the admission of evidence as to the robbery. These assignments are therefore overruled.

Certain of the specifications of error also relate to the refusal of direct instructions to the jury, that unless there was a precedent, common purpose on the part of the appellant and those with him to kill or do great bodily harm to the deceased, he could not be convicted, except on satisfactory proof, beyond a reasonable doubt, that the appellant aided and abetted the one who did the killing. These features, however, were not pressed in the argument, and we see no particular in which there was error in this respect. As was well said by the learned court below in the opinion refusing a new trial: "It was not necessary that there should have been any common purpose to kill Daniel McGrath, or anyone else. If the killing was the probable consequence of the offense in which the appellant and his companions were engaged, the appellant was chargeable even though the killing was done by another in the execution of the common purpose."

What this court said, in *Weston v. Commonwealth*, 111 Pa. St. 272, 2 Atl. 191, also properly applies: "If there was a common purpose to kill, and the prisoner was present, aiding and abetting in that purpose, of course he was liable for the act of one of the party he was aiding in carrying out that purpose. Equally true is it that he would be so liable if the killing was a probable consequence of the common purpose." Thus, it is said in *Wharton's Criminal Law*, eighth edition, section 220: "It is not necessary that the crime should be a part of the original design; it is enough if it be one of the incidental probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose. Thus where A and B go out for the

purpose of robbing C, and A, in pursuance of the plan, and in the execution of the robbery, kills C, B is guilty of murder."

The last assignment of error complains that the court did not instruct the jury that there could be no conviction of the appellant for murder, because the indictment charged him with having killed McGrath upon November 11, 1899, when the evidence showed that he was shot upon that day, but did not ~~soo~~ die until November 15, 1899. If this question was to be raised at all, it should have been by motion in arrest of judgment; but there is no merit in the suggestion. If such instruction had been given, it would have been error. The variance between the allegation and the proof in this respect was not material. It is necessary in nearly all cases to allege that the offense was committed at a specified time, in order that the indictment may be certain. It is not necessary, however, except where time enters into the nature of the offense, to prove the exact time alleged. Any other time may be shown on the trial, if it is prior to the finding of the indictment and within the period prescribed by the statute of limitation: 1 Chitty's Criminal Law, 224.

None of the assignments of error are sustained. The jury were properly instructed upon every question of law legitimately raised by the evidence; the different requirements of the law as to murder and its various degrees, and as to manslaughter, were all explained to them, and they were instructed that the commonwealth must satisfy them, beyond a reasonable well-founded doubt, of the guilt of the prisoner, before he could be convicted. The fixing of the crime was left entirely to the jury. The court said to them: "Your verdict may be not guilty, it may be guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of manslaughter, accordingly as you believe the evidence." The charge of the court, as a whole, was an impartial presentation of the case without any tendency to mislead or confuse the jury. The portions to which exceptions are taken are fully sustained by the authorities.

The judgment is affirmed and the record remitted for the purpose of execution according to law.

INDICTMENT—TIME OF OFFENSE.—In criminal pleading the time at which the offense is charged to have been committed is not material, unless time is of the essence or gist thereof: *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229. The indictment must state the time, but the proof need not be confined to

that time. It is only necessary to show that the offense was committed prior to the finding of the indictment: *State v. Orrell*, 1 Dev. 138, 17 Am. Dec. 563; and within the period of limitations: *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410.

HOMICIDE—ACCESSARIES.—Where several persons conspire to make an attack upon another, and in furtherance of this common design one of them kills him, the others are guilty of murder: *Williams v. State*, 81 Ala. 1, 60 Am. Rep. 133, 1 South. 179; *Spies v. People*, 122 Ill. 1, 8 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898. But see *State v. Furney*, 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213; *White v. People*, 139 Ill. 143, 32 Am. St. Rep. 196, 28 N. E. 1083.

ENGLERT v. ENGLERT.

[198 Pa. St. 326, 47 Atl. 940.]

WILLS — TESTAMENTARY CAPACITY — EVIDENCE — Want of testamentary capacity is not shown by the testimony of witnesses, including physicians, called to express the opinion that the testatrix was not fit to do business or to make a will, if such opinion is not based upon facts sufficiently indicating the disappearance of the intelligence needed when she came to dispose of her property.

WILLS.—DELUSIONS OR HALLUCINATIONS not relevant to the making of a will, and with nothing to show that it resulted therefrom, are not sufficient ground for setting it aside.

WILLS — UNDUE INFLUENCE—SOLICITATIONS.—Undue influence, however used, in order to avoid a will, must destroy the free agency of the testator at the time and in the very act of making the will. Solicitations, however importunate, cannot of themselves constitute undue influence. Though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate.

L. N. Patterson and A. A. Patterson, for the appellant.

W. A. Hudson, J. A. Emery, T. H. Davis, and J. D. Buckley, for the appellees.

BROWN, J. In this issue *devisavit vel non* the contestants allege want of testamentary capacity and the exercise of undue influence over the testatrix at the time her will was executed. We have, with proper care, reviewed all the testimony and are unable to discover what could have justified the jury in finding that the testatrix did not, at the time she executed her will, possess that intelligent perception and understanding of the disposition she was about to make of her property, which are essential to a valid testamentary distri-

bution of one's estate. In support of her alleged incapacity, it is true, several witnesses were called who expressed opinions that she was not fit to do business or to make a will, but that of no one of them was based upon facts which sufficiently indicated the disappearance of the intelligence which she needed when she came to dispose of her property; ³³⁰ and this applies to the two physicians sent to examine her by those interested in procuring opinions that her mind was impaired. The first of these doctors, having had a single interview with her, lasting but fifteen or twenty minutes, testified that he could not remember whether he had asked her any questions which she refused to answer, but concluded from her looks and age, and because she and her house were unclean, that she was childish and unfit to make a will. The other, as the result of an interview of about the same duration, though unable to recall any question put to her, or whether she had made any reply, thought that she was childish because he had seen her, and tried, without success, to lead her into conversation. The old lady might very properly have regarded these two witnesses as intruders in her home and declined to have any communication with them. We need not, however, dwell longer on the absence of proof of her mental incapacity. The learned trial judge in his charge to the jury, said: "The only evidence in this case which of itself would point strongly to the fact that Mrs. Englert was not of sound mind is the evidence of hallucinations"; but he ought to have added that as these delusions were not relevant to the will, and there was nothing to show that it resulted from them, they ought not to be regarded as sufficient to set it aside. Upon the whole evidence the jury should not have been allowed to guess that the testatrix was of unsound mind because, in their judgment, there should have been a different distribution of her estate. In cases like this the only sure protection to the estates of the dead, passing to beneficiaries under their wills, can be found in the court; and most appropriate now are the words of our brother Mitchell, in *Shreiner v. Shreiner*, 178 Pa. St. 57, 35 Atl. 974, in which a will was declared valid that had been torn to pieces by the whims of a jury: "Upon the whole case we have, first, delusions showing impairment of mind in some directions, but not in any way relevant to the making of a will; failure of memory as to persons, places, and recent small occurrences, but not shown to extend to a single serious matter; and the opinions of a number

of witnesses, most of them unlearned on the subject, that the testatrix was unfit to make a will." The burden having been upon the appellees to submit proper proofs of their contention, and having failed so to do, it is unnecessary for us to refer to what plaintiff proved—to the testimony of the subscribing witnesses ³³¹ to the will, of the inmates of the house in which testatrix lived, of her own physician, of two others who made a careful examination of her condition, of the priest who visited her in her last sickness and of the neighbors who had seen her for months—all speaking for her intelligence in executing the will of April 2, 1898, in which the special object of her bounty was the same son who had been her chief concern in her former will of June 15, 1891.

The first point presented by the appellant was "that upon the question of undue influence, the verdict should be for the plaintiff." This was refused. It should have been affirmed. "Undoubtedly, undue influence may so operate as to destroy a will, for in such a case the testator is not a free agent; he becomes the mere implement of another's craft, and his testament that of the superior will. But influence short of this is not what is technically known as 'undue influence.' This term has been carefully defined and its effect considered in many of our own cases, among others, *Thompson v. Kyner*, 65 Pa. St. 368, *Eckert v. Flowry*, 43 Pa. St. 46, *McMahon v. Ryan*, 20 Pa. St. 329, and *Tawney v. Long*, 76 Pa. St. 106. According to these cases, undue influence may be exercised either through threats or fraud; but, however used, it must, in order to avoid a will, destroy the free agency of the testator at the time and in the very act of making the testament. Solicitations, however importunate, cannot of themselves constitute undue influence; for though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate": *Trost v. Dingler*, 118 Pa. St. 259, 4 Am. St. Rep. 593, 12 Atl. 296. The testimony will be searched in vain to find undue influence tested by the foregoing, if it can be found at all. The jury should have been instructed to find for the will. The judgment is reversed, the issue directed to be set aside, and the costs are to be paid by the appellees.

WILLS.—UNDUE INFLUENCE which will invalidate a will must be such as operates upon the testator at the time of making the will, and must be an influence relating to the will: *In re Kaufman*, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192. It must, in some measure, destroy the free agency of the testator; that he is

dissuaded by solicitations or argument is not enough: See the monographic note to *In re Hess' Will*, 31 Am. St. Rep. 670, 671.

WILLS—INSANE DELUSIONS.—Though a testator may be subject to insane delusions, his disposition of his property is valid unless connected with such delusions: See the monographic note to *People v. Hubert*, 63 Am. St. Rep. 94-96.

BATES v. DAY.

[198 Pa. St. 513, 48 Atl. 407.]

CORPORATIONS, FOREIGN—STOCKHOLDERS' LIABILITY.—The liability of stockholders in a foreign corporation cannot be enforced in a state other than the state of its incorporation by a suit in equity in which part only of the creditors are made parties plaintiff, and only one stockholder is made party defendant. To maintain such a suit, it must be in behalf of all the creditors and against all of the stockholders, and the corporation itself must be made a party to the suit.

J. C. Jones and L. W. Barringer, for the appellants.

T. P. Prichard, for the appellees.

§15 POTTER, J. The Colorado Savings Bank, a corporation organized under the laws of the state of Colorado, failed, and made an assignment §16 for the benefit of its creditors. The assignee has not yet completed the conversion of the assets or made any final distribution of the proceeds thereof, and the deficiency as regards payment to the creditors is not ascertained. The statute of Colorado fixing the liability of shareholders in institutions of this kind declares that "shareholders in banks, savings banks, trust, deposit, and security associations, shall be held individually responsible for debts, contracts, and engagements of said association, in double the amount of the par value of the stock owned by them respectively."

In construing this statute, the supreme court of Colorado, in the case of *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565, held that the proper procedure to enforce the liability of stockholders in an insolvent bank, for the debts of the corporation, is by suit in equity by a creditor or creditors, for the benefit of all the creditors.

Suit was commenced by a bill in equity in the district court for the county of Arapahoe, Colorado—by certain creditors of the Colorado Savings Bank, against all the stockholders of the

the principal obligation, which rests upon the corporation. Nor is it proper that part of the creditors should be allowed to maintain a separate suit for the enforcement of the liability in their own behalf; the security created by the statute should rather be held for the benefit of all creditors.

With part of the creditors—and a single stockholder only—as parties to this proceeding, it was not within the power of the court below to administer the equitable relief required.

The bill should have been filed by or on behalf of all the creditors, and the corporation itself and all the shareholders should have been made parties defendant. The decree of the court below is affirmed, and the appeal dismissed with costs.

STOCKHOLDERS' LIABILITY.—IN A SUIT TO ENFORCE the statutory liability of stockholders, all the creditors should be parties plaintiff, or the suit should be in behalf of all; all the stockholders should be joined as parties defendant, unless it is impossible, useless, or impracticable; and the corporation should be made a codefendant: See the monographic note to *Thompson v. Reno Sav. Bank*, 8 Am. St. Rep. 857. Consult, also, *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 58 Pac. 565.

DUTTON v. LANSDOWNE BOROUGH.

[198 Pa. St. 563, 48 Atl. 494.]

MUNICIPAL CORPORATIONS—JOINT LIABILITY WITH PROPERTY OWNER.—An action in tort to recover damages for personal injury, caused by a defective sidewalk, may be brought either against the municipality or the property owner, but they cannot be sued jointly. The measure of their responsibility is very different. That of the owner is primary and absolute, while that of the municipality is secondary and supplemental.

ACTIONS—JOINT TORT FEASORS.—If two are sued jointly for a tort, and the evidence is not sufficient to hold one, there may be a discontinuance as to that one, and the trial may proceed as to the other.

TRIAL—JOINT TORT FEASORS.—If two are sued jointly for a tort, and the case is given to the jury as against both, but the evidence fails to show that both were tort feasors, it is error to permit a recovery against one or both. Such a case involves, not a mere misjoinder of parties, but a misjoinder of causes of action.

Action in trespass against a property owner and a municipality sued jointly to recover for personal injury caused by a defective sidewalk within such municipality. Judgment for plaintiffs, and the defendant appealed.

L. L. Smith, for the appellant.

V. G. Robinson, for the appellees.

⁵⁶⁵ POTTER, J. The theory upon which the municipality and the property owner were sued jointly in this case is radically wrong. As a result, the judgment must be reversed, for the reason that the action was brought in a form which cannot be sustained.

The distinction between the duty of the municipality and the property owner is clearly stated in *Brookville Borough v. Arthurs*, 130 Pa. St. 501, 18 Atl. 1076, by Justice Sterrett, in which he says: "The borough and Mr. Arthurs were in no sense of the term joint wrongdoers. They did not co-operate in the same wrongful act in such way as to make them joint wrongdoers. While it is true that the borough could not deny its liability for neglect of its general duty to see that the streets and sidewalks thereof are kept in reasonably good and safe condition, it cannot be contended that the corporation in any way co-operated ⁵⁶⁶ with the defendant in his neglect to perform the duty which, as between it and himself, he assumed to discharge. As shown by the evidence, the true relation of the defendant to the borough was that of a resident property owner bound by the ordinance, and still further by his express promise, to keep the sidewalk in question in good repair. The claim is not for contribution, but to recover from the defendant the amount which the plaintiff was compelled to pay in consequence of his neglect to do what he should have done and expressly promised to do."

The authorities all seem to agree that the plaintiff has the right, in cases of this character, to sue either the municipality or the owner, but it does not follow that both can be sued jointly, the measure of responsibility being very different. In *Lohr v. Philipsburg Borough*, 156 Pa. St. 246, 27 Atl. 133, which was a sidewalk case, the lower court held the borough to the same measure of liability as an employer. But this court, speaking by our brother Mitchell, in reversing, said: "There is a clear distinction to be taken between the duties in the two cases. That of the master is primary and absolute, to know and to do, while that of the borough, or of any municipality, as to sidewalks, is secondary and supplemental, to see that the property owner makes and maintains a safe pavement; and its breach of duty is not in failing to do the work, but in failing to compel the owner to do it."

And again, in *Duncan v. Philadelphia*, 173 Pa. St. 550, 51 Am. St. Rep. 780, 34 Atl. 235, this court said: "It is the duty of a municipality to exercise a reasonable supervision over its sidewalks; but, as the first duty in relation to them rests upon the property owner, and that of the city is secondary only, it is not liable for defects without notice, actual or implied, of their existence."

And again, in *Mintzer v. Hogg*, 192 Pa. St. 137, 43 Atl. 465, the court says: "It is the primary duty of property owners along a street to keep in proper repair the sidewalks in front of their respective properties; hence it is that, owing to this primary liability, many cases exist in this state in which, after recovery from the municipality the latter has successfully recovered over from the property owner on account of his breach of his primary duty to keep the sidewalk in a safe condition." We repeat, therefore, that it does not follow that because both the property owner and the borough may be liable, each for the neglect of a particular duty, that they may be joined in an action of tort. The ⁵⁰⁷ breach of duty here is not like that of maintaining a party-wall—which is equally incumbent upon both parties. The case of *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193, 50 Am. St. Rep. 801, 33 Atl. 237, has been cited as analogous to the view taken by the trial court. But that case did not turn upon the precise point being considered here, and the court did not pass upon any difficulty growing out of the pleadings. It is difficult to see where any authority for sustaining the judgment in this case can be found in *Little Schuylkill Navigation Co. v. Richards*, 57 Pa. St. 143, 98 Am. Dec. 209, or in *Leidig v. Bucher*, 74 Pa. St. 65, as they are authority for the doctrine that defendants who have not joined in committing a wrong should not be joined in the same action. Neither does *Laverty v. Vanarsdale*, 65 Pa. St. 507, and other similar cases cited, touch the point here. If two defendants be sued jointly for a tort, and the evidence is not sufficient to hold one, there may be a discontinuance as to that one, and the trial may proceed as to the other. In such case, the joint action does not fail because the tort is not joint, if committed, but for the reason that the evidence fails to show any concert of action.

But where the declaration is for a joint tort, and the case goes to the jury as against both defendants, if, under such circumstances, the evidence fails to show that the defendants were joint tort feorsors, it is error to permit a recovery against one

or both. Such a case would show, not a mere misjoinder of parties, but a misjoinder of causes of action.

In any view of the question, the relation between the municipality and the owner presents separate and distinct causes of action, and they cannot be sued jointly.

The judgment is therefore reversed.

SIDEWALK—LIABILITY OF CITY AND LOT OWNER.—It is the duty of a municipality to exercise reasonable supervision over its sidewalks; but, as the first duty in relation to them rests upon the property owner, and that of the city is secondary only, it is not liable for defects without notice of their existence: *Duncan v. Philadelphia*, 173 Pa. St. 550, 51 Am. St. Rep. 780, 34 Atl. 235. But see *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921. Where a property owner makes an excavation in the sidewalk, which is known to the town authorities and is left unguarded, a person falling into it may sue the property owner and also the town: *Brown v. Loulsburg*, 126 N. C. 701, 78 Am. St. Rep. 677, 36 S. E. 166. See, too, *Pawtucket v. Bray*, 20 R. I. 17, 78 Am. St. Rep. 837, 87 Atl. 1.

BOARD OF CHARITIES v. LOCKARD.

[198 Pa. St. 572, 48 Atl. 496.]

SPENDTHRIFT TRUSTS—SUPPORT OF WIFE AND CHILDREN.—The income of a strict spendthrift trust cannot be attached in the hands of the trustee, by virtue of a warrant of seizure issued by a magistrate at the instance of the board of charities and correction, for the maintenance of the wife and children of the cestui que trust, whom he has deserted.

SPENDTHRIFT TRUSTS.—A provision in a will that "all moneys or legacies hereby bequeathed are to be paid to the legatees in person, and to no one else, and shall not be assignable or transferable, nor subject nor liable in any way whatever for any debts or obligations of any of said legatees, heretofore or hereafter created," creates a strict spendthrift trust.

J. M. Gest, for the appellant.

S. E. Cavin, for the appellee.

573 **POTTER, J.** The question in this case is whether the income of a strict spendthrift trust can be attached in the hands of the trustee, by virtue of the warrant of seizure issued by a magistrate at the instance of the board of charities and correction, under the desertion act, for the maintenance of the wife and child of the cestui que trust.

William F. Lockard by his will bequeathed a certain share of his estate to the Fidelity Insurance, Trust, and Safe Deposit Company, in trust for his son Edwin J. Lockard, and provided: "All moneys or legacies herein bequeathed are to be paid to the legatees in person, and to no one else, and shall not be assignable or transferable, nor subject nor liable in any way whatever for any debts or obligations of any of said legatees, heretofore or hereafter incurred or contracted or created."

Upon the affidavit of Alida Lockard, wife of Edwin J. Lockard, a warrant of seizure was issued and served upon the trustee. The provisions of the will were set forth by the trustee in an answer filed; but the court of quarter sessions confirmed the warrant, and ordered the trustee to pay a weekly sum for the support of the wife of the cestui que trust.

The general rule of law in Pennsylvania sustaining spendthrift trusts is admitted; but it is strongly urged, upon the ⁵⁷⁴ ground of public policy, that an exception should be made in the case of a beneficiary having a wife and children dependent upon him for support. If the fund had been attached after coming under the control of the legatee, the action of the court below would have been entirely justified. But the difficulty is that the fund was attached before it was within the control of the beneficiary, and while it was yet in the hands of the trustee. The fund did not originate with the beneficiary, but the bequest was made by another, the father, who had a right to bestow his benefactions as he pleased, and, in this case, he chose to bestow them upon the son, and upon him alone.

We agree entirely with all that has been said about the duty of the beneficiary to support his wife and child; but that does not authorize interference with the right of another individual to dispose of his own property as he may see fit. In this case, the pressure was prematurely applied. There are methods of reaching the beneficiary directly.

The general validity of spendthrift trusts in Pennsylvania is thoroughly well settled, and is not now an open question. The present case is ruled directly by that of *Thackara v. Mintzer*, 100 Pa. St. 151. It was there argued that an intention to exempt an income payable to the cestui que trust from liability for the support of his family would be contrary to the policy of the law. This court, however, held that no such distinction could be recognized. The testator impressed on the fund exemption from all kinds of legal process against the trustee. He made no distinction in the character of the obligations which

might rest upon his son. The court there said: "If we depart from the clearly expressed will of the testator in this respect, we make a new will, instead of enforcing the one he made," and it positively refused to sanction any legal proceeding against the trustee, instituted for the purpose of intercepting his action, and defeating the trust stamped on the fund by the donor.

In the case of *Decker v. Directors of the Poor*, 120 Pa. St. 272, 13 Atl. 915, the facts are different. There, the testator created a trust in real estate for the benefit of his son, directing the trustee to pay over all the rents and profits, every six months, to the cestui que trust, or to whomsoever he in writing might designate. The cestui que trust had power to control the income in the hands of the trustee. In case of a sale of the real estate, he also had ⁵⁷⁵ power to terminate the trust. It was upon this right of control of the income while in the hands of the trustee that the seizure was based.

In the present case, the testator was extremely careful to exclude the cestui que trust from all control of this fund; he provided that the money was to be paid to the legatee in person, and to no one else; that it should not be assignable or transferable, nor subject nor liable in any way whatever for any debts or obligations of any of the said legatees.

We are of opinion, therefore, that a strict spendthrift trust was here created and that there can be no seizure of the fund in the hands of the trustee. The judgment is therefore reversed, and the order of the court of quarter sessions is revoked.

SPENDTHRIFT TRUSTS are discussed in the monographic notes to *Garland v. Garland*, 24 Am. St. Rep. 686-697; *Smith v. Towers*, 9 Am. St. Rep. 405-408; *Freeman on Executions*, 4th ed., secs. 116, 189a, 459. See, also, the recent cases of *Winthrop Co. v. Clinton*, 196 Pa. St. 472, 79 Am. St. Rep. 729, 46 Atl. 435; *Munroe v. Dewey*, 176 Mass. 184, 79 Am. St. Rep. 304, 57 N. E. 340.

SHELL v. DEPERVEN.

[198 Pa. St. 600, 48 Atl. 813.]

EXECUTORS AND ADMINISTRATORS — PLEDGE OF PROPERTY OF ESTATE.—One of several executors may transfer personal property of the decedent, by way of sale or pledge for value.

EXECUTORS AND ADMINISTRATORS — SALE OR PLEDGE OF DECEDENT'S PROPERTY.—If a coexecutor sells or pledges the personalty of the decedent, in fraud of the estate, to one who has no notice of the fraud, and acts in good faith, the transferee acquires good title to the property, in the absence of facts sufficient to put him on inquiry.

EXECUTORS AND ADMINISTRATORS — PLEDGE OF PROPERTY—FRAUD—NOTICE.—If a coexecutor who has the active management of the estate, and who bears a good business and financial reputation, borrows money for the estate in the course of administration, of a person who does not know that the borrower is a coexecutor, or of any fraudulent intent on the part of the latter, who represents that the loan is for the benefit of the estate, and who pledges certain stock as security for the loan, and afterward transfers it to the lender, the facts are not sufficient to put the latter on inquiry and prevent him from acquiring good title to the stock.

EXECUTORS AND ADMINISTRATORS—PLEDGE OF PROPERTY OF ESTATE—FRAUD—NOTICE.—The fact that personalty fraudulently pledged by a coexecutor, without knowledge by the pledgee of the fraud, is specifically bequeathed to the executor as trustee, does not impose a greater duty of making inquiry on such pledgee to prevent him from being charged with constructive notice of the fraud, than if the property was a simple asset of the estate.

F. P. Prichard and E. G. Hamersley, for the appellant.

S. P. Tull and D. P. Hibberd, for the appellee.

⁶⁰¹ MESTREZAT, J. Joseph E. Schell died October 6, 1889. He was the owner of thirty-four shares of the capital stock of the Fire Association of Philadelphia, which stood in his name on the books of the association at the time of his death. By his will he bequeathed to his executors, in trust, one-eighth part of his residuary estate for the benefit of each of his four daughters, and he directed that the respective shares of two of his daughters should include eight shares of the capital stock of the Fire Association, and the respective shares of the other two daughters should include ⁶⁰² nine shares of the said stock. The executors were his son, Frederick H. Schell, and one Samuel S. Sibbs, a business man at that time of good standing and repute. Early in September, 1891, Sibbs re-

requested the defendant, Mrs. Elizabeth S. M. Barton, then Mrs. Elizabeth Stokes Morris, to loan him, as executor of Schell's estate, the sum of fifteen hundred dollars, saying that the estate needed the money, and agreed to give her as collateral security stock of the Fire Association to an equal amount, which he showed her at that time. Mrs. Barton was not aware that there was a coexecutor, nor did she know to what purposes Sibbs intended to apply the borrowed money. She made the loan as requested, but no obligation was given nor stock transferred to her by a written assignment at that time. Sibbs paid to her at regular intervals by his own personal check the interest on the loan. In the latter part of 1894, or early in 1895, Dr. Barton, the husband of Mrs. Elizabeth S. M. Barton, notified Sibbs, who had attended to some business for Mrs. Barton and had charge of her papers, that he would take charge of his wife's affairs; and thereupon Sibbs delivered to him a collateral note, dated September 9, 1894, for fifteen hundred and thirty-seven dollars and fifty cents, payable to her order, and signed by him as "executor, estate of Jos. E. Schell, dec'd." This note recited the fact that the maker had delivered six shares of the capital stock of the association as collateral security for the prompt payment at maturity of his liability. Accompanying the note was a power of attorney, dated September 9, 1894, executed by Sibbs as executor of Joseph E. Schell, deceased, constituting Mrs. Barton his attorney to sell, assign, and transfer six shares of the capital stock of the Fire Association. With the note was also delivered to Dr. Barton, for his wife, a certificate of twenty-three shares of the stock of the association, standing in the name of Joseph E. Schell. The whole transaction was without the knowledge or consent of the coexecutor, and the money borrowed was not appropriated to the use of the estate of Joseph E. Schell.

In May, 1894, the executors filed their account, which was audited by the orphans' court, and an adjudication was filed October 27, 1894, by which the stock of the Fire Association was awarded to the executors as trustees under the provisions of the will. Subsequently, in 1899, Sibbs defaulted and disappeared, and the facts of the loan and hypothecation of the stock ⁶⁰³ became known for the first time to his coexecutor. The latter then filed the present bill against the defendants, and John H. Deperven, executor of the will of Henry Deperven, deceased, praying that the defendants might make discovery as to the certificates for shares of stock of the association, deliv-

ered to them by Sibbs; that they be restrained from negotiating or transferring the stock, and also be ordered to deliver the certificates in their hands to the complainant. An answer was filed by the defendants and by Deperven, and, after hearing, the court below entered a decree in favor of the defendants, holding that the complainant was entitled to the stock only upon repayment of the amount of the loan made by Mrs. Barton, with interest. From this decree the complainant appealed. A decree was entered against Deperven, from which he appealed, and which is considered and determined in an opinion filed herewith.

The learned counsel for the appellant frankly concede that one of several executors may transfer personal property of the decedent for value by way of sale or pledge, and that the transferee will take a good title thereto, unless he has knowledge, actual or constructive, of facts which put him on inquiry as to whether the transaction is one made in course of the administration of the estate and for its benefit. As suggested, therefore, the single question here is, whether Mrs. Barton had either actual or constructive notice of facts which should have put her on inquiry, which would have resulted in a knowledge of the fraudulent conduct of Sibbs.

The very proper admission by counsel, which is fully justified by all the authorities, together with the uncontrovertible facts, make the question for determination here a very narrow one. The facts, as conceded by all parties, show conclusively that Mrs. Barton had no actual knowledge of any intended fraud on the part of Sibbs at any time during the entire transaction. She acted in the utmost good faith, and loaned the money to him in his representative capacity, on his allegation to her, in her language, "that he wanted money as executor of the Schell estate, and it would be an accommodation to him if I had it; if I couldn't give it, he would apply to someone else." This was less than two years after the death of the testator and while the estate was in course of administration. The good ⁶⁰⁴ reputation of Sibbs in the community, and her own intimate business relations with him, fully warranted her in believing his representations that the loan was for the benefit of the estate and that it would be so applied. There was, at the date of the loan, nothing whatever to discredit Sibbs or his business integrity with Mrs. Barton, or, as the evidence clearly discloses, with any person in his community. No business man of the most exacting care, who knew him, would have hesitated

one moment to have granted him the loan on the terms of the contract between him and Mrs. Barton. We therefore have Mrs. Barton's action in the premises in keeping with the most careful business methods and approved by the course pursued by intelligent and accurate business men.

It is contended, however, by the appellant that, while the transfer of the stock made by one executor only and by way of pledge and not sale was not sufficient in itself to put the transferee on inquiry, yet it was a fact that should have made her cautious, and made it more incumbent on her to be alert and heedful of other circumstances in the case. But, under the circumstances of this case, we do not see that these facts should arouse in Mrs. Barton even a suspicion of any intention of Sibbs to misappropriate the loan. She was not dealing with a stranger, but with a man whose business standing with her and in the community for many years had taught her to rely implicitly on his word. She was fully authorized to rest upon that in determining the verity of his assertion that he needed the funds for the use of the estate. Nor does the fact that he made the transfer of the stock as sole executor authorize the inference of bad faith. It is conceded that Sibbs was the active executor and that Mrs. Barton did not know that he had a co-executor. It cannot be seriously contended that under these circumstances, Sibbs could not have sold the stock and passed a good title. If that be true, he, as sole executor, could pledge it, and invest the pledgee with a complete title. The authority to pledge the personal property of the decedent for the purpose of raising money or securing debts rests on the same principle, is governed by the same rules, and is subject to the same limitations as apply to sales: 11 Am. & Eng. Ency. of Law, 2d ed., 1031. The facts in the case of *Ellis' Appeal*, 8 Week. Not. Cas. 538, relied upon by the appellant, show that it does not support his ⁶⁰⁵ contention. There the executor, in fraud of his trust, transferred stock as collateral security for a debt of his own, to one who had notice of the fact that the stock was the property of the estate of the borrower's testator, and actual knowledge of the fact that there were other executors who did not join in the transfer. Here, as we have seen, Mrs. Barton did not know that Sibbs intended to apply the money to his own use, but had a right to presume the contrary, and was ignorant of the fact that he had a coexecutor. The case is clearly distinguishable on its facts from the case at bar.

The fact that the property was specifically bequeathed to the executors as trustees, as claimed by the appellant, does not impose upon the purchaser or pledgee any greater duty to inquire into the necessity of the sale or pledge than if it were merely an asset of the estate not so bequeathed. As suggested by the learned judge of the court below, such specific bequests would necessarily be subject to the necessity of a sale for the payment of debts, and in such case the purchaser or pledgee need not inquire into the necessity of the sale or pledge.

It is further contended on the part of the appellant that Mrs. Barton acquired no title to the stock as against the estate until the delivery of the note and accompanying papers to her husband in the latter part of 1894 or in the early part of 1895. We think this position ignores the facts in the case. The loan was made in 1891, and at that time and in consideration thereof, Sibbs promised an equivalent amount of Fire Association stock as collateral, and then and there showed to Mrs. Barton the stock which was to be held as collateral. This was in Sibbs' office, which had been the office of Mrs. Barton's former husband, Joshua H. Morris, and in which all her papers were kept in a box, in charge of Sibbs. As she demanded the security before she made the loan, and in response thereto he showed her the stock, it is fair to presume, under the circumstances stated, that during the time which elapsed between the date of the loan and the delivery of the securities to Dr. Barton, they were in Mrs. Barton's box, which was in the control of Sibbs as her representative. While this would not be sufficient to transfer the title to the stock, yet it is a fact worthy of consideration in determining the equities of the case and the intention of both parties as to the delivery of the securities. The loan ~~was~~ was unquestionably made on the faith of the stock which was shown Mrs. Barton at the time, under such circumstances as to lead her to believe that it was a delivery to her, and it was so considered by both parties. Having the authority to make the pledge, and a full consideration therefor having been paid to the representative of the estate, the failure to make the formal transfer of the securities until September, 1894, should not be permitted to deprive Mrs. Barton of her just and equitable claim to the stock. We therefore agree with the learned judge of the court below that, so far as Mrs. Barton's rights are concerned, "the power of attorney must be regarded as having been made at the time when she loaned the money upon the faith of the security which the letter of attorney gave to

her. That was the time when it was promised to her, and in equity she ought to be regarded as having acquired it at that time."

The view we take of the case renders it unnecessary to consider the effect on Mrs. Barton's title to the stock of the proceedings in the orphans' court on the account filed by the executors.

It follows that the court below was right in holding that Mrs. Barton was entitled to retain the six shares of stock until she was paid the amount of the loan made by her to Samuel S. Sibbs, as executor of the estate of Joseph E. Schell, deceased.

The assignments of error are overruled and the decree is affirmed.

AN EXECUTOR MAY PLEDGE personal assets of the estate: See the monographic note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 184. Consult, also, *Hemmy v. Hawkins*, 102 Wis. 56, 72 Am. St. Rep. 863, 78 N. W. 177. Where a bank, in good faith, loans money to an executor upon his individual note, secured by a pledge of stocks belonging to the estate, and upon the statement that the loan is for the purposes of the estate, the pledge is valid: *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338.

JOINT EXECUTORS.—THE AUTHORITY OF ONE of several joint executors or administrators is entire with respect to the delivery, gift, sale, or release of the testator's goods: *Shaw v. Berry*, 35 Me. 279, 58 Am. Dec. 702. See, also, *Beall v. Hilliary*, 1 Md. 186, 54 Am. Dec. 649, and note.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

NOHRDEN v. NORTHEASTERN RAILROAD COMPANY.

[59 S. C. 87, 87 S. E. 228.]

RAILROADS—NEGLIGENCE—BURDEN OF PROOF.—If a person is killed by a railroad train at a crossing, the burden of showing that he knew of the approach of the train, although it did not give the statutory signals, is upon the railroad company.

RAILROADS—NEGLIGENCE.—It does not necessarily follow that the fact that a person injured by a railroad train at a crossing knew of the approach of the train in time to avoid the collision implies gross negligence on his part, so as to bar a recovery.

NEW TRIAL ORDERED BY THE SUPREME COURT is a trial de novo, and the jury should not in any manner be influenced by the action of the former jury.

TRIAL — INSTRUCTIONS — APPELLATE PRACTICE.—If the charge given by the trial court states to the jury the law applicable to the case, and one of the parties desires a more extended charge, he must embody his propositions in the form of requests to charge, otherwise he cannot complain of error in the charge given.

APPELLATE PRACTICE.—EXCEPTIONS, TO BE CONSIDERED on appeal, must contain a statement of the specific errors or omissions complained of.

NEGLIGENCE CAUSING DEATH—DAMAGES—WOUNDED FEELINGS.—If a person is killed by the negligence of another, the jury may consider the wounded feelings of the beneficiaries in estimating damages, under a statute providing that the jury is authorized to give "such damages as it may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought."

Action for damages. The requests to charge and the charge given by the trial court and referred to in the opinion are as follows:

"Gentlemen of the jury: Before I proceed to deliver to you my charge in this case, I will direct my attention to the requests to charge made, first by the plaintiff, and secondly by the defendant. And that means this: The plaintiff's attorneys, that is, the attorneys for Nohrden, have their view of the law of the case, and the defendant's attorneys, that is, the attorneys for the railroad company, have their view of the law, and they have a right under the law to request me to state their views to you and to direct you to find according to their view of the law. So that if I fail to state the view of the law entertained by these gentlemen, they would thereafter have a remedy, to wit, by appeal to the supreme court, and have the judgment reversed and a new trial ordered, and have the case tried according to their view of the law. That has been the case in this case once heretofore. This action was tried before a former circuit judge, and he directed the jury on that trial his view of the law, and that view was contrary to that entertained by the counsel for the railroad company, and for that reason the supreme court at Columbia set the verdict aside and ordered a new trial of this case according to the view of the law declared by the supreme court, which governs this court in all subsequent trials. Now, so much for the explanation of the law I am about to read to you now. The attorneys for the Nohrdens request me to state this to you as the law:

"11. The statute of this state does not speak of pecuniary loss or injury, which might possibly tend to show that the injury for which the damages are allowed was confined to the deprivation of some legal claims susceptible of measurement by a pecuniary standard, but its language is much broader, and gives to the jury the right to award such damages as they may think proportionate to the injury resulting from such death, and it is quite certain that the beneficiaries of the action may sustain injury by death of a relative over and above the loss of any legal claim which they may have upon such relative. All of those requests I charge you are proper.

"(At this point counsel for plaintiff asked the court to charge the jury that new trial was granted merely on the question of the measure of damages. His honor said he would do so when he came to give his view of the law.)

"The requests by the defendant are these:

"6. If the jury find that the statutory signals were not given, that does not make the company liable, if Nohrden knew with-

out such signals that the train was approaching, yet, notwithstanding such knowledge, he attempted to cross in the face of the train, or to board the train. And this important addition, not by myself, but by the counsel who proposed the request: 'And the jury believe that only a grossly careless person would have so acted under the circumstances.' You being the judges of that fact.

"The seventh proposition I decline to charge. (The seventh proposition as submitted read as follows: 'In order to prove that the failure to give signals contributed to the accident, the plaintiff must show that his intestate was not aware of the train's approach in time to have avoided the collision, for the only object of a signal is to give such notice. Unless, therefore, a preponderance of the evidence satisfies you that the deceased did not know of the train's approach in time to have avoided the accident, you must find for the defendant.')

.....

"The other questions of negligence here are not common-law negligence, but what is called negligence for violation of statute. The legislature has prescribed how railroads shall cross crossings, and for this reason: there are railroads all over the country, and they are crossing public highways all over the country. A man has a right to travel on a public highway, and a railroad company, when it gets its charter, has a right to cross it. And it is the dictate of reason that when two persons use a crossing, each must use it with reference to the rights of the other. Now where the two cross is a road where the public has a right and where the railroad company has a right to be, and each must use it with reference to the right of the other to be there. A statute has prescribed how a railroad must cross a public highway; that is to say, in the language of the act I have read to you, they must, for so many yards before they cross it, ring their bell or blow their whistle, or, if within a less distance than that, to wit, so many rods, as I have read, they must ring their bell or blow their whistle continuously—for what? In order to notify the public who use that place that they are coming to use it, and so avoid accident. That is the object of the act. Our courts have gone on and considered that act to mean this: that if a railroad company fails to do that thing, fails to ring their bell or blow their whistle, and an accident occurs, the presumption is it occurred from the negligence of the railroad company, if it occurred on a crossing, because that provision

was made to protect the rights of each party on a crossing. It is for you to say whether the railroad company did give these signals or not. If it did, it complied with the law; if it did not, it violated the law. Whether they did or not is a matter for you. If it did not, and this boy was thereby killed, the law implies negligence to them, and the plaintiff is entitled to recover, unless, under the language of the statute, these things happened: unless the boy was guilty of gross negligence, or unless he was violating the law. Now what is gross negligence? I have defined to you what negligence is; negligence is the failure of a man to come up to the standard of an ordinary man. Now gross negligence is something short of that—it is an act which an indifferent man would be guilty of; and if this boy was guilty of not only a lack of care, but a considerable lack of care, a greater lack of care, such a lack of care as would make him grossly negligent, then that defeats his action, under the very language of the statute. Whether or not he was guilty of that sort of conduct is a question for you. You have heard the testimony. Fix in your minds what a negligent man and what a grossly negligent man is, and, if this boy was grossly negligent on that night, that defeats his action. Or, the statute goes on to say, if he was violating the law. Now, gentlemen, I am very candid to say to you that I do not know exactly what that means. If he had violated a statute of the state, I would say that was a violation of the law; or if he was violating the common law, I would say that was a violation of the law; or if he was guilty of a criminal act under the laws of the country, statute or common, I would say whether that was a violation of the law—that would be a violation of the law. But it is not necessary for me to decide in this case, and I am not going to decide in this case questions that I am not requested to decide, unless it is necessary to enlighten you. And I have not been requested to say whether or not the violation of a city ordinance, if the boy did violate it, was such a violation of the law as would defeat this action. I am not going to do it, for this reason, gentlemen, because, as I say, I have not been requested to do it; and with these jury trials the law has got to be so voluminous and so complex, and in so many books, that a man fairly gets dizzy in its mazes, and where a case is well fought on both sides, astute lawyers who know the law, and have many months to prepare these cases, it is practically impossible for a circuit judge on a hearing like this to state the law in all its limitations; and a failure to state it according to how it may be would

be an error of law, and would entitle the party who appeals therefrom to a new trial. For that reason I am not going to look up questions of law in this case which we are not obliged to decide. That is a direct and frank statement, so far as I am concerned.

"Now, gentlemen, as to the matter of damages. You heard some little skirmishing between counsel and some oral requests to me to make certain charges. I charge you, in the language of the statute and in the language of our supreme court, again avoiding any unnecessary difficulty, and that is this: that when a jury comes to give damages, they may give such damages as they think proportioned to the injury. To what injury? To the death of the boy. To who? To the party who brings the action, to wit, the father of that boy. Now, if I were to go to work to tell you what sort of damages, to define what such damages were, I might be in the same plight some judges are who define a reasonable doubt. There is the language; 'such damages,' is plain English, and you know what it means as well as I do. That is what the statute says, and that is what it means. . . .

"Now, as to the ground of this new trial: When this case was tried before a jury before, the circuit judge charged that the jury might give punitive damages, and the jury found a verdict, and the supreme court says that was error, that the jury could not give punitive damages. Now, what are punitive damages, gentlemen? To illustrate it in a plain way, it is this: if a man walks up to you in a public street, in a public place, and breaks your nose with his fist, the actual damage may not be very much to you; it might be repaired, and you might be as well as you ever were before; but if he does it in a spirit that is willful—that is, reckless; that is, careless of the rights of his fellows; in other words, if he does it in a mean spirit, what the law calls willful—then you could sue him, and recover not only for the broken nose, but for his willfulness, and the law gives what is called punitive damages; that is, smart money, not only to repair the damage done to you, but to inflict a penalty by the lash upon his back. That is the difference between the two. So the supreme court has held that in a case like this, where the statute gives the right to the relative of a dead man, you cannot give such a verdict as will punish the railroad company for willful wrongdoing, but you must confine your verdict to such damages as may be proportioned to the injury; what is called in law compensatory damages."

Judgment for plaintiff and defendant appeals.

W. H. Fitzsimons, for the appellant.

Legare & Holman and W. St. Julien Jervay, for the appellee.

McIVER, C. J. This is an action to recover damages for the alleged negligent killing of the plaintiff's intestate by one of the trains of the defendant company, on the 8th of September, 1897. The case came on for trial before his honor, Judge Gage, and a jury, and a verdict having been rendered in favor of the plaintiff, the defendant appeals from the judgment entered upon said verdict, basing his appeal upon the several exceptions set out in the record. As these exceptions impute error to the circuit judge in his charge to the jury, it is proper that the charge, as well as the exceptions thereto, should be set out by the reporter in his report of the case.

The first exception charges the circuit judge with error in refusing to charge defendant's seventh request, to wit: "7. In order to prove that the failure to give signals ²⁹ contributed to the accident, the plaintiff must show that his intestate was not aware of the train's approach in time to have avoided the collision, for the only object of a signal is to give such notice. Unless, therefore, a preponderance of the evidence satisfies you that the deceased did not know of the train's approach in time to have avoided the accident, you must find for the defendant." Inasmuch as the circuit judge, in response to defendant's sixth request, had instructed the jury that if the signals required by statute had not been given, that would not make the defendant liable, if the deceased knew without such signals that the train was approaching, and yet, notwithstanding such knowledge, he attempted to cross in face of the train or to board the train, and the jury believe that only a grossly careless person would have so acted under the circumstances, it seems to us that the practical question raised by the first exception is, whether the burden of proof is upon the plaintiff or upon the defendant to show whether the deceased knew of the approach of the train in time to have avoided the collision. By the express terms of the request, the burden of proof is placed upon the plaintiff; for the language used is, that "the plaintiff must show that his intestate was not aware of the train's approach in time to have avoided the collision." So that the practical inquiry is as to the burden of proof. We do not think that this burden is upon the plaintiff, for two reasons: 1. Because it would be requiring the plaintiff,

in violation of the general rule, to prove a negative; 2. Because the knowledge of the deceased of the approach of the train in time to avoid a collision is a matter of defense, to be proved by the defendant, and not to be disproved in advance by the plaintiff. The statute (Rev. Stats., sec. 1692) provides that if a person is injured at a crossing by a collision with the engine or cars of a railroad corporation, "and it appears that the corporation neglected to give the signals required by this article [Rev. Stats., sec. 1685], and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, ¹⁰⁰ unless it is shown that, in addition to a mere want of ordinary care, the person injured was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence, or unlawful act, contributed to the injury." From this language it is apparent that if a person brings an action for damages sustained by reason of a collision with a railroad train at a point where the railroad track "crosses any public highway or street or traveled place," and makes it appear that the railroad corporation neglected to give the signals required by statute, and that such neglect contributed to the injury, he is entitled to recover. But if it is shown that such person was at that time guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence, or unlawful act, contributed to the injury, then he cannot recover. It is clear that the plaintiff in such a case is not bound to negative by testimony such conduct on his part as would defeat his recovery, but that the burden of proof is upon the defendant to show such conduct on the part of the plaintiff as would defeat his right to recover. The case of *Barber v. Richmond etc. R. R. Co.*, 34 S. C. 444, 13 S. E. 630, cited by counsel for appellant, is not in point; for in that case there was no question as to the burden of proof, and could not have been, as it was stated at page 451 (34 S. C., 13 S. E. 632), that while there was evidence of negligence on the part of the defendant in failing to give signals required by statute, yet it could not be said that the injury complained of was the result of such negligence, in face of the admitted fact testified to both by the party injured and by his companion, that he knew not only that the train was approaching, but was near at hand, before he attempted to cross the track. Then follows the quotation from that case incorporated in the exception, to the effect that the

manifest object of the statute in requiring the signals to be given was to give notice of the approach of the train to persons crossing or desiring to cross the track, and if the plaintiff knew of the approach of the train, then such notice ¹⁰¹ was not necessary. For the reasons thus indicated, there was no error in refusing the seventh request. There is, however, another reason why the request should have been refused, and that is the omission of the important addition made to the sixth request, at the instance of counsel for plaintiff. It does not follow necessarily that the fact that the person injured knew of the approach of the train in time to avoid the collision would imply gross negligence on his part, and hence the seventh request could not, even if otherwise unobjectionable, have been granted without adding what was added to the sixth request.

The second and third exceptions, imputing error to the circuit judge in what he said to the jury in reference to the former trial of this case, and as to the disposition of the appeal from the judgment entered on such trial, may be considered together. It is quite true, that when a new trial of a case is ordered by this court, such trial is a trial de novo; so much so that incompetent evidence received at the former trial without objection, which thereby became competent on that trial, cannot be received on a new trial, if objected to when offered (*Petrie v. Columbia etc. R. R. Co.*, 29 S. C. 317, 7 S. E. 518, 519), and must be conducted, as far as practicable, as if there had been no previous trial. This, however, does not preclude the parties from agreeing to receive on the new trial either the whole or certain portions of the testimony taken at the previous trial, as seems to have been done in this case. But it would be improper to allow any reference to the action of the former jury, calculated to influence the jury then trying the case. Each jury must act upon its own responsibility and according to its own view of the testimony submitted to it, entirely uninfluenced by the action of any other jury. Indeed, it not infrequently happens that the testimony adduced on a new trial is very different from that offered on the original trial, and hence it would be manifestly improper for the jury on a new trial to allow itself to be influenced by the action of the former jury. With this preliminary statement of what we understand to be the true rule ¹⁰² upon the subject, we proceed to inquire whether such rule has been violated in this case. The reference made by the circuit judge to the former trial in the first quotation from

his charge, which is embraced in the second exception, was a mere illustration of his statement to the jury, that if he failed to state the law correctly the party injured thereby had his remedy by appeal to the supreme court, and manifestly did not violate the rule, for there is nothing there said calculated to induce the jury to believe that they should pay any attention whatever to the action of the jury in the former trial. The second quotation from the judge's charge is nothing more than a statement—and a correct statement—of the fact that the supreme court had granted a new trial because of error on the part of the circuit judge who presided at the previous trial, in instructing the jury that they might give punitive damages in a case of this kind. There is no allusion to the action of the former jury, except that they found a verdict under an erroneous instruction as to the law. It is true that the circuit judge, after disposing of the written request to charge submitted by counsel for plaintiff, was asked, by said counsel, to charge the jury that the new trial "was granted merely on the question of the measure of damages," to which his honor replied, that "he would do so when he came to give his views of the law." But, as matter of fact, he never did charge the jury that the new trial was granted "merely on the question of the measure of damages," but did charge the jury, as to this matter, in the language found in the second quotation from the charge embraced in the second exception. In this, as we have said, there was no error. The third exception, which is rather an argument than an exception, cannot, for that reason, be sustained, nor is the argument therein presented well founded. It must be kept in mind that the question presented by these two exceptions is whether Judge Gage said anything to the jury which was calculated to induce them to believe that it had been determined at the former trial that the plaintiff would have been entitled to a verdict, but for the error on the part of the ¹⁰³ judge who presided at the former trial in instructing the jury that they might give punitive damages in a case of this kind. We do not see that there was anything in what Judge Gage did say to the jury which was calculated to induce any such belief. It does not appear that the jury were informed that there were any other exceptions to the charge of the judge who presided at the former trial; except that in regard to punitive damages, and they certainly were not informed, and could not have been informed, whether such other excep-

tions (if any) were well or ill founded; for this court, in its former decision (*Nohrden v. Northeastern R. R. Co.*, 54 S. C. 498, 32 S. E. 526), had expressly declined to consider any of the other exceptions. We do not see, therefore, how it is possible that the jury could have drawn the inference "that a former jury had found a verdict, under a proper charge, with the single exception of the mistake as to punitive damages."

The fourth exception raises the point that the circuit judge erred in refusing or failing to instruct the jury as to what was the nature of the damages which they were entitled to give, in the event they reached the conclusion that the plaintiff was entitled to a verdict; or, to state the point more precisely, in not instructing the jury what was the meaning of the following language, used in section 2316 of the Revised Statutes, to wit: "And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." In the first place, it will be observed that there was no request that the circuit judge should explain to the jury what the meaning of the language used in that quotation from the statute was, or to define any of the terms used therein. He had laid before the jury the terms of the statute under which the action was brought, and had, as requested by plaintiff's eleventh request, instructed the jury in the language contained in the first quotation embraced in the fourth exception, which is taken substantially from the opinion of this court in *Petrie v. Columbia etc. R. R. Co.*, 29 S. C. 104 320, 7 S. E. 520, and had in another part of his charge instructed the jury that they could not give punitive or vindictive, but only compensatory, damages proportionate to the injury resulting from the death of plaintiff's intestate to the parties for whose benefit the action was brought, and in still another portion of his charge had used the language found in the second quotation embraced in the fourth exception, which seems to form the basis of appellant's claim of error. Now, in view of the charge as thus stated, which it seems to us gave to the jury the law applicable to the case, if the appellant desired a more extended charge, it was its duty to embody its propositions in the form of requests to charge. See *State v. Kendall*, 54 S. C. 195, 32 S. E. 301, where Mr. Justice Gary uses the following language: "The tenth exception imputes error to the circuit judge in not charging the proposition of law therein stated. His honor substantially charged the law ap-

applicable to the case, and if the appellant desired a more extended charge, it was his duty to embody his propositions in the form of a request to charge. This exception is overruled." In this case, the circuit judge having charged what law was in his opinion applicable to the case, and having given to the jury the construction which had been placed upon the statute by this court in the quotation from Petrie's case, the appellant was bound, if a more extended charge was desired, to submit a request to charge, which was not done. For this reason the fourth exception must be overruled. But there is another reason why this exception cannot be sustained, and that is that the exception contains no statement of the specific error or omission complained of; what particular instruction should have been given to the jury is not pointed out. The statement in the exception that the circuit judge erred in not declaring the law as required by the mandatory terms of the constitution, which it is conceded does not mean all the law upon the subject under consideration, but the law applicable to the case made by the testimony (*Norris v. Clinkscales*, 47 S. C. 521, 25 S. E. 809), is clearly too general and ¹⁰⁵ insufficient, as it is not stated on what points the judge failed to declare the law, or what "limitations of the law" he omitted to explain.

But even if we are permitted to resort to the argument for the purpose of ascertaining what were the points upon which it is alleged that the judge omitted to explain the law, we suppose that the error complained of was in the omission to instruct the jury that they are not allowed to take into consideration, in estimating the amount of damages, the wounded feelings of the persons for whose benefit the action is brought, growing out of the death of their relative. But, as we have said, there was no request for any such instruction in this case as there was in Petrie's case, where the late Judge Norton was requested and did so charge the jury. But we do not understand that it was decided in that case that the wounded feelings of the beneficiaries at the loss of their relative could or could not be considered by the jury as one of the elements in making their estimate of the amount of damages. For while Judge Norton did so charge the jury in that case, yet, as there was no exception to that portion of his charge, this court did not, and could not properly, consider whether there was any error in that portion of his charge. All that was really decided in that case, so far as this particular matter was concerned, was that the jury were not confined, in making their estimate of the amount

of damages, to the loss of any legal claim which the beneficiaries may have had upon their deceased relative, but, in the language of the statute, "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom, and for whose benefit, such action shall be brought." This is manifest from the fact that the exception there considered made the point that, as the children of the deceased, for whose benefit the action was brought, were all adults, and had been settled off to themselves several years before their mother was killed by the railroad train, they could not have any legal claim on the deceased for their support. As to ~~100~~ this point, the supreme court used the following language: "It is contended, however, that unless the children had some legal claim on the deceased for support, no damages could be recovered for their benefit; as the children of deceased were all adults, living to themselves, they could not possibly have any such claim. This view is based upon the idea that the 'injury' spoken of in the statute, means only the deprivation of a legal right. This, it seems to us, is a narrow view of the statute, and, on the contrary, its language repels any such view"; and the court, after considering the terms of the statute, proceeds to say: "As it is quite certain that the beneficiaries of the action may sustain injury by the death of a relative, over and above the loss of any legal claim which they may have upon such relative, it follows that the view contended for cannot be sustained." It is quite clear, therefore, that all that was decided in Petrie's case, so far as the particular matter now under consideration is concerned, was that the fact that the beneficiaries have no legal claim on their deceased relative does not deprive them of the right to recover damages in a case like this; and that it did not decide the question which, as we understand, the appellant desires to make by the fourth exception, to wit, whether, in a case like this, the jury are at liberty, in forming their estimate of the amount of damages, to take into consideration the wounded feelings of the beneficiaries resulting from the death of their relative. Nor, so far as we are informed, is there any case in this state which distinctly decides that question, though the very recent case of *Mason v. Southern Ry. Co.*, 58 S. C. 70, 79 Am. St. Rep. 826, 36 S. E. 440, does seem to imply that such an element may be taken into consideration by the jury in estimating the amount of damages, for in that case the person killed was an

infant about sixteen months old. But the decision was based upon Petrie's case, and the case of Strother v. South Carolina etc. R. R. Co., 47 S. C. 375, 25 S. E. 272, in which the question was whether the circuit judge had erred in refusing to instruct the jury: "That the measure of damages in statutory actions for injuries causing deaths is compensation for the pecuniary ¹⁰⁷ loss to the survivors from the death of the deceased." Held, that there was no error, basing the decision upon the terms of the statute and the decision in Petrie's case. The decisions elsewhere seem to be conflicting. In 8 Encyclopedia of Law, at page 926 of the second edition, we find the following language, which is said to be an expression of the general rule: "Unless the statute expressly so provides, nothing can be allowed to the plaintiff, by way of damages, as a solatium, to compensate him for his wounded feelings or for the mental anguish the death of his relative may have caused him, and proof of such mental suffering is not admissible on the question of damages." But in the very next paragraph, "a modified doctrine," as it is termed, is stated as follows: "In some jurisdictions, however, where the legislature has provided that the jury shall assess such damages as they deem fair and just with reference to the injuries resulting from the death, thus omitting to limit the damages to the 'pecuniary' injury, it is held that the jury may consider the loss of society caused from the death, and the comfort which a parent would have derived from rearing his child." It seems to us that what is stated above as the modified doctrine is much more in conformity to the terms of our statute and the trend of our decisions construing the statute than the above-stated general rule. By the express terms of our statute, as we have seen, the jury are authorized to give "such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom, and for whose benefit, such action shall be brought," and this court has construed the statute, in Petrie's case and in Strother's case, recognized and followed in Mason's case, supra, to mean, not merely the pecuniary injury which may be sustained by the loss of any legal claim which they may have had upon the deceased for their support, or for the services of the deceased; and in the case of Garrick v. Florida etc. R. R. Co., 53 S. C. 448, 69 Am. St. Rep. 874, 31 S. E. 334, recognized and followed in the former decision in the present case, has held that the language of the statute necessarily implies that compensatory, and not punitive, damages may

be ¹⁰⁸ awarded. So that when the circuit judge laid before the jury the terms of the statute, and instructed them how that statute had been construed by this court, he did all that was necessary; and there was no necessity for him to go further and explain to the jury what was meant by the words "such damages," for, in fact, these words are practically defined by the language of the statute itself, as construed by the cases just cited, to mean whatever damages the jury may think are a proper compensation to the parties for whose benefit the action is brought for the injury, whether arising from the pecuniary loss or otherwise, sustained by such parties by reason of the death of their relative. If it should be said, as has been argued in this case, that the view which we have adopted would leave the jury entirely untrammelled by any rule, and would permit them to indulge in "wild and extravagant" notions as to what is a proper compensation to the parties for the injury sustained, two answers can be made. In the first place, they are not, as we have seen, entirely untrammelled, for they cannot give vindictive damages, and are limited to such an amount as they may think will afford a proper compensation for the injury sustained by the parties for whose benefit the action is brought. And in the second place, if the law-making power has seen fit to place no other limit upon the jury than what they may think proportioned to the injury sustained, we do not see by what authority this court can undertake to prescribe any additional limitation. It is no more than what is allowed in every action for a tort sounding in damages. The only remedy provided by law against capricious, wild, or extravagant verdicts is by a motion, addressed to the circuit court, for a new trial upon the ground of excessive damages, and our books of report show that such remedy has, not infrequently, been resorted to in just such cases as the present. The fourth exception must, therefore, be overruled.

The fifth and sixth exceptions, based as they are upon the passage from the charge which is quoted in the fifth exception, may be considered together. These exceptions ¹⁰⁹ are practically disposed of by what we have said in considering the fourth exception. But it may be proper to notice the particular matter complained of in these two exceptions, viz., whether it was error to refuse to charge the jury that a violation of the city ordinance therein referred to by the deceased would be such a violation of law as would defeat this action, because he had

not been requested to do so. While it is true that the circuit judge was not requested to charge as there indicated, yet it is equally true that the circuit judge did charge defendant's thirteenth request, with certain words very properly added by the judge. That request reads as follows: "Section 609 of the revised ordinances makes it unlawful for any person, not employed by railroad companies, to get on or off their cars or locomotives while the same are in motion," to which the judge added these words, "within the corporate limits of the city," to which additional words no exception was, or could be, taken, as they are taken from the words of the ordinance. Now, as the jury were instructed that the statute provides that if a person is injured by a collision with the engine or cars of a railroad company at a crossing, and it appears that the railroad company had neglected to give the signals prescribed by the statute, such railroad company shall be liable for all damages caused by the collision, unless it is shown that the person injured was, at the time, "acting in violation of the law and that such unlawful act contributed to the injury," and when, as we have seen, the jury were likewise instructed that the city ordinance made it "unlawful" for any person, not employed by the railroad company, to get on or off the cars or locomotives while the same were in motion, within the corporate limits of the city, it seems to us that the circuit judge declared the law applicable to the case; and if the appellant desired a more extended charge, a request to that effect was necessary. The fifth and sixth exceptions must also be overruled.

The judgment of this court is, that the judgment of the circuit court be affirmed.

NEGLIGENCE.—AS TO THE BURDEN OF PROOF in actions to recover for negligence, see *Wieland v. Delaware etc. Canal Co.*, 167 N. Y. 19, ante, p. 707, and note, 60 N. E. 234.

DAMAGES FOR CAUSING THE DEATH of a human being are generally confined to the pecuniary loss sustained by the surviving kindred of the deceased, without any allowance for their mental suffering: See the monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375; *McHugh v. Schlosser*, 159 Pa. St. 480, 89 Am. St. Rep. 699, 28 Atl. 291.

KENNEDY v. ROUNDTREE.

[59 S. C. 324, 37 S. E. 942.]

EXECUTIONS — LEVY, SUFFICIENCY OF.—Memorandum of a levy under execution made on a separate piece of paper, and not attached to the execution, but placed with it in the proper office, is sufficient compliance with the statute to constitute a levy.

EVIDENCE—ABSENCE OF REVENUE STAMPS.—Although the amount of United States internal revenue stamps required by law is not placed upon a deed or other instrument, it is nevertheless admissible in evidence in the state courts.

J. O. Patterson, for the plaintiff, appellant.

Bates & Sims, and A. J. and P. H. Green, for the defendants, also appellants.

³²⁵ GARY, J. The record contains the following statement, to wit: "The four above cases were commenced by the service of the summons and complaint on the tenth day of February, 1899, and were heard together upon the pleadings and testimony reported by the master, a jury trial having been waived. Each of the said cases were for the recovery of real estate. The complaint and answer are the same in each case except the description of the land. The plaintiffs and defendants claim from the same source of title, to wit, from Allen J. Weathersbee. The plaintiff claims under a deed from F. H. Creech, sheriff, who sold land described in the complaint under execution issued out of the court of common pleas, under a judgment of the court of ³²⁶ common pleas entitled W. H. Kennedy v. J. Allen Weathersbee. At the close of the plaintiff's case, the defendant moved for a nonsuit upon the ground that no levy had been shown upon the execution relied on to support the sale, and also upon the further ground that the deed from the sheriff to the plaintiff did not have any United States revenue stamps upon it. The judge sustained the first ground, but overruled the second ground of nonsuit."

The plaintiff appealed upon the following exception: "1. Because his honor, Judge Gage, erred in holding that no levy had been shown upon the execution relied upon to support the sale; whereas, his honor should have held that the testimony of the sheriff and the levy set out upon the schedule annexed to the execution and the recitals in the sheriff's deed were sufficient proof that a levy had been made, and a sufficient compliance with the statute requiring the levy to be indorsed upon the ex-

ecution or upon a schedule thereto annexed." The judgment and execution in the case of W. H. Kennedy against Allen J. Weathersbee were introduced in evidence; also, the following instrument of writing, which will hereinafter be explained by the testimony of the sheriff, to wit:

"W. H. KENNEDY
v.
A. J. WEATHERSBEE. }

"By virtue of the above execution, I have levied upon and will sell at Barnwell C. H., on Monday, the 2d day of January, 1899, during the usual hours of sale, to the highest bidder for cash, the following real estate, to wit: One tract of land, containing 240 acres, more or less, known as the Wall place, bounded by lands of James Simmons, W. W. Harley, Mrs. Williams and the estate of Jacob Holman. [Then follows a description of four tracts of land, including the land in dispute.] Levied upon as the property of A. J. Weathersbee to satisfy execution and cost lodged in my office in favor of W. H. Kennedy. Terms cash, purchaser to pay for papers.

"Sheriff's office, December 10th, 1898.

"FRANK H. CREECH,

"Sheriff Barnwell County."

The following is an extract from the testimony of Frank H. Creech, sheriff: "Q. I hand you the original execution in that case ³²⁷ marked Exhibit 'C.' Please state if you made any levy under that execution, when you made them, and what you levied upon. (Questions objected to.) A. This was the original execution filed in my office December 1, 1898, and entered in execution book, page 69. I levied on the property described in this paper, Exhibit 'E,' on the 10th December, 1898. Q. Where did you have the paper, marked Exhibit 'E'? A. In the execution. My reason for putting it in there— (Defendant's counsel objects to question upon ground that Exhibit 'E' is a separate and distinct paper not in any manner connected with the execution, and purports to be and is the advertisement of the property for sale, and is not signed by the sheriff nor pasted to, nor otherwise attached to, the execution)—was that there was so much property that it was impossible for me to get sufficient space to copy the levy without writing it on a separate paper, and this is an exact copy of the levy, dictated by me to Mr. Hagood, my clerk, and placed inside of the execution as the levy on the property,

and could have been found at any time in my office. Q. Do you know what paper you had this advertisement in? A. It was in 'The Barnwell Sentinel,' which is published in this county. Q. Was the advertisement posted on the courthouse door? A. Yes, sir. Q. Was it posted and advertised from the date of the levy as stated in the book? A. Yes, sir. Recross: (Exhibit 'C' shown witness.) Q. On the back of that execution I see your name written; is that your signature? A. No, sir. Q. Is that the signature of your regularly appointed deputy? A. No, sir, it was made by Mr. Hagood, my clerk. Q. Does your official seal as sheriff appear anywhere upon that paper? A. No, sir. Q. You stated just now that Exhibit 'E' was a copy of the levy made? A. Yes, sir. Q. Where is the original? A. That is an exact copy of the levy as made by me. We made three copies, one was the original, and two were the copies; one was for the paper and one was to be posted upon the courthouse door and one as levy—this paper here. Q. As a fact, then, there were three originals? A. Yes, sir, made ³²⁸ at the same time upon a typewriter. The other two were exactly like that one. Q. Did you sign that paper (Exhibit 'E' being shown witness)? A. No, sir, but I dictated the signature." It seems that there is no dispute as to the facts. Section 2114 of the Revised Statutes is as follows: "The sheriff shall make a memorandum in writing of the date of every levy and specify the property upon which the levy has been made on the process or in a schedule thereunto annexed, and if more than one process shall be levied on such property, reference on each shall be made to such memorandum on schedule." In the case of *Tyler v. Williams*, 53 S. C. 367, 31 S. E. 298, the court, in construing this section, says: "To constitute a levy, therefore, four things may be done: 1. Memorandum in writing must be made by the sheriff; 2. This memorandum must contain the date of the levy; 3. It must specify the property levied on; 4. Such memorandum must be made on the execution or in such schedule thereto annexed." It is not contended that there was a failure to comply with the first three of said requirements, but that the memorandum was not annexed to the execution. While it is true there was not in technical strictness the physical annexing of the memorandum to the execution, there was, nevertheless, a substantial compliance with the provisions of the statute. This technical defect worked no injury to the rights of any of the parties. The exception must be sustained.

The respondent's attorneys served the following notice: "Please take notice that if an appeal to the supreme court is perfected in the above-stated cases, the defendants will insist that the order of nonsuit and judgment thereon be sustained upon the following grounds upon which the motion for nonsuit was based, and which was urged in argument before the circuit court and passed upon by the presiding judge, to wit: That plaintiff had failed to make out his case, in that the deed from the sheriff to the plaintiff, under the execution sale in the case of *Kennedy v. Weathersbee*, did not bear the requisite United States revenue ~~320~~ stamps, and hence was not in evidence." The provisions of the United States statutes upon which the respondents rely are: Schedule "A," page 15, of War Revenue Act Conveyance: "Conveyance: Deed, instrument, or writing whereby any lands, tenements, or other realty sold shall be granted, assigned, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons, by his, her, or their discretion, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents, and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents." And section 14, same page 9, same act: "Sec. 14. That hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof shall be recorded or admitted or used as evidence in any court until a legal stamp or stamps denoting the amount of tax shall have been affixed thereto, as prescribed by law." The court has not been referred to any case from the United States supreme court deciding this question, and as we have not been able to find any, we presume that court has not decided or determined the question. In construing the act of Congress from which we have quoted, the court, in the case of *Knox v. Rossi* (Nev.), 57 Pac. 179, 48 L. R. Ann. 305, says: "We have not been referred to any adjudication of the provisions concerning stamped instruments offered in evidence under the act of Congress cited, but substantially the same provisions contained in the internal revenue law of 1862 have frequently been the subject of judicial construction. One of the early cases under this law was *Carpenter v. Snelling*, 97 Mass. 452. After stating that the law did not in terms extend to state courts—the law of 1898 in this respect is the same—the decision proceeds: "The language of the enactment is only that

no instruments or documents not duly stamped shall "be admitted or used as evidence in any court" until the requisite stamps shall be affixed. This provision can have full operation and ³³⁰ effect if construed as intended to apply to those courts only which have been established under the constitution of the United States, and by acts of Congress over which the federal legislation can legitimately exercise control, and to which they can properly prescribe rules regulating the course of justice, and the mode of administering justice. We are not disposed to give a broader interpretation to the statute. We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states, which shall be obligatory upon them. We are not aware that the existence of such a power has ever been judicially sanctioned. There are numerous and weighty arguments against its existence. We cannot hold that there was an intention to exercise it where, as in the provision now under consideration, the language is fairly susceptible of a meaning which will give it full operation and effect within the recognized scope of the constitutional authority of Congress.'"

The case of *Knox v. Rossi* (Nev.), 57 Pac. 179, 47 L. R. Ann. 305, refers to several other cases, and there are copious notes to this case in the volume of the *Lawyers' Reports, Annotated*, hereinbefore mentioned, sustaining this conclusion, based upon both reasoning and authority. This additional ground must be overruled.

The judgment of the circuit court is reversed.

EVIDENCE.—UNSTAMPED INSTRUMENTS may be received in evidence in state courts, notwithstanding the internal revenue act: *Small v. Slocumb*, 112 Ga. 279, 81 Am. St. Rep. 50, and note, 37 S. E. 481; *Insurance Co. v. Estes*, 106 Tenn. 472, post, p. 892, 62 S. W. 149.

PEARSON v. PEARSON.

[59 S. C. 367, 37 S. E. 917.]

HOMESTEADS — EQUITY.— UNSECURED CREDITORS of a decedent have no right or equity to compel a mortgagee of the homestead to exhaust such homestead, set apart to the widow and children, before he can claim any part of the assets of the estate as applicable to his mortgage.

J. H. Hudson and T. W. Boucher, for the appellants.

H. H. Newton, for the appellee.

³⁶⁸ GARY, J. The facts of this case are fully set out in the decree of his honor, the circuit judge. In this he says: "The main question presented for my decision is whether the unsecured creditors of the deceased have such claim, or lien, or interest in the assets of the estate as that they have the equity to compel the mortgagee first to exhaust the homestead set apart to the widow and children before he can claim any part of the assets of the estate as applicable to his mortgage." He decided that the unsecured creditors had such an equity.

³⁶⁹ We will first consider whether he erred in so ruling. The general principles ably discussed in the circuit decree are to be considered in connection with the constitutional and statutory provisions of our law relating to the right of homestead. This case is to be determined by the law in force prior to the constitution of 1895: *Bank of Orangeburg v. Kohn*, 52 S. C. 120, 29 S. E. 625. Section 32, article 2, of the constitution of 1868, provides as follows: "The general assembly shall enact such laws as will exempt from attachment and sale under any meane or final process issued from any court, to the head of any family residing in this state, a homestead in lands, whether held in fee or any lesser estate, not to exceed in value one thousand dollars, with the yearly products thereof; and to every head of a family residing in this state, whether entitled to a homestead exemption in lands or not, personal property not to exceed in value the sum of five hundred dollars. . . . It shall be the duty of the general assembly at their first session to enforce the provisions of this section by suitable legislation." The legislature passed a statute fixing the amount of exemption in lands at one thousand dollars and in personal property at five hundred dollars. The legislature also enacted that "no waiver of the right of homestead, however solemn,

made by the head of a family at any time prior to the assignment of the homestead, shall defeat the homestead provided for in this chapter; provided, however, that no right of homestead shall exist or be allowed in any property, real or personal, aliened or mortgaged, either before or after assignment by any person or persons whomsoever, *as against the title or claim of the alienee or mortgagee, his, her, or their heirs or assigns*" (italics ours): Rev. Stats., sec. 2130. The right of homestead existed against everyone who was not either an "alienee" or "mortgagee" of the deceased: *Ex parte Allison*, 45 S. C. 338, 23 S. E. 62, and cases therein cited. The homestead exemption is a legal right conferred by the constitution, which even the head of the family could not destroy, except by "alienation" or "mortgage." The right for which the unsecured creditors contend is a mere equity, and in no sense could be regarded as either an "alienation" ³⁷⁰ or "mortgage," by which alone the homestead exemption could be defeated; yet to allow this equity would destroy the homestead. In the case of *People's Bank v. Brice*, 47 S. C. 134, 24 S. E. 1038, this court decided that a junior judgment creditor had the right to compel a mortgagee to exhaust the homestead before proceeding to subject the other property to the payment of his mortgage; but we are unwilling to extend the doctrine to unsecured creditors. In section 28, article 3, of the constitution of 1895, one of the provisos is as follows: "That no waiver shall defeat the right of homestead before assignment, except it be by deed of conveyance or by mortgage, and only as against the mortgage debt; and no judgment creditor or other creditor whose lien shall not bind the homestead shall have any right or equity to require that a lien which embraces the homestead and other property shall first exhaust the homestead." We have quoted this provision to show that the constitutional convention—many of whose members were lawyers of marked ability—did not suppose that unsecured creditors had the right to assert this equity. If the framers of the constitution had entertained a doubt as to the right of unsecured creditors to require that a lien which embraces the homestead and other property should first exhaust the homestead, it is reasonable to presume they would have included unsecured creditors in the foregoing provision, as otherwise unsecured creditors would enjoy higher rights than judgment creditors and other lien creditors. The exceptions raising this question are sustained.

Under this view, the other questions become merely speculative and, therefore, will not be considered.

The judgment of the circuit court is reversed.

HOMESTEAD — MARSHALING SECURITIES.—Additional liability will not be imposed upon a homestead by marshaling securities: *Mitchelson v. Smith*, 28 Neb. 583, 28 Am. St. Rep. 357, 44 N. W. 871. Where A held a mortgage on land in part of which the mortgagor's widow claimed a homestead, and B held a mortgage on the other part, in an action of foreclosure on A's mortgage, it was decreed that he should not be forced to sell first the part on which the homestead was claimed: *Marr v. Lewis*, 81 Ark. 203, 25 Am. Rep. 553.

SUTTON v. CLARK.

[59 S. C. 440, 38 S. E. 150.]

APPELLATE PRACTICE — INSTRUCTIONS.—The trial judge, in charging the jury upon the issues raised by the pleadings, need not charge except upon such issues, and if he fails to state any of such issues it is incumbent upon the party desiring to make this a ground of appeal to have called attention to the omission at the time; otherwise he cannot complain of instructions given.

TRIAL—INSTRUCTIONS—POSSESSION.—It is not error to instruct the jury that "possession is nine points in the law," if such language is followed by legal definitions of presumptions arising from possession.

LIMITATION OF ACTIONS—REMAINDERMEN.—The statute of limitations does not run against remaindermen until the termination of the life estate.

ADVERSE POSSESSION AS AFFIRMATIVE DEFENSE.—Title to land by adverse possession may be affirmatively set up by defendant under a general denial of plaintiff's title.

LIMITATION OF ACTIONS — LIFE TENANT — REMAINDERMEN.—If the statute of limitations begins to run against a person in his lifetime, his death and devise of the land for the life of another, with remainder over, does not arrest the running of the statute in favor of the remainderman unless there is a new trespass during the holding of the tenant for life.

ADVERSE POSSESSION — PRESUMPTION OF GRANT-TACKING.—A defendant, under a general denial, may prove that he solely, or in connection with others, has been in the possession of the land in dispute long enough to presume a grant, and in making up such adverse possession may tack his possession to those through whom he claims.

W. P. Pollock and E. McIver, for the appellants.

Stevenson & Matheson, for the appellee.

⁴⁴¹ GARY, J. This action was commenced on the first day of March, 1899, for the recovery of certain real property hereinafter mentioned. As some of the questions ⁴⁴² raised by the exceptions require reference to the pleadings to determine what issues were involved, it is deemed necessary to set out a copy of the complaint and answer. The complaint was as follows: "The plaintiff above named by his complaint shows: 1. That he is the owner in fee simple and entitled to the possession of all that certain piece, parcel, or tract of land, situate, lying, and being in the county of Chesterfield, state of South Carolina, containing five hundred and seventy-seven acres, more or less, bounded on the north by lands belonging to the estate of Neill Crawford, on the east by said estate and by Big Black creek, on the south by lands of said estate and of J. M. Clark, and on the west by lands of E. C. Clark, reference being had to grant from the state of South Carolina to J. J. Schroter, bearing date December 23, 1827, and plat thereto attached, bearing date July 20, 1827, description thereof will more fully appear; 2. That Neill Crawford, late of the county and state aforesaid, was for a number of years in the unlawful possession of a part of said tract of land, and the said Crawford recently departed this life intestate, as plaintiff is informed and believes, leaving as his heirs at law and distributees his nephews, the defendants, E. C. Clark, J. M. Clark, G. N. Clark, and W. A. Clark, and his nieces, the defendants, Eleanor Knight and Mary Knight, and Angus Douglass and D. L. Douglass, E. C. Douglass and Ella Douglass, the husband and children, respectively, of his niece, Nancy Douglass, who had departed this life intestate, leaving no other heirs at law—the said Ella Douglass being an infant over the age of fourteen years; 3. That at the death of the said Neill Crawford, the defendant, E. C. Clark, as heir at law of said Crawford, for himself and the other defendants above named, set up a claim to said lands and took possession of a part of same under said claim, which said claim is pretensive and has no force at law, but said claim is a cloud on plaintiff's title; 4. That the plaintiff is entitled to the possession of all of said lands, but the defendants, as above stated, unlawfully withhold the possession of a part thereof from him."

⁴⁴³ The answer was as follows: "For a first defense: 1. That they deny on information and belief the allegations of paragraphs 1 and 4 of said complaint, and so much of paragraph 2 of the same as allege that Neill Crawford was in unlawful

possession of the land described in the complaint, and that Angus Douglass has any interest in the same, or claims any interest therein as heir at law of Neill Crawford or otherwise, and they deny so much of paragraph 3 as alleges that the claim of such of the defendants as do claim an interest in the same, is pretensive and of no force in law. For a second defense: 1. That neither the plaintiff nor any of his grantors or ancestors or predecessors has been in possession of the land in dispute here or in any part thereof within ten years last past before the commencement of this action, and these defendants, their ancestors, predecessors, and grantors (except the defendant, Angus Douglass), have been in open, notorious, and avowed adverse possession of the same (part being held by said defendants together as heirs at law of Neill Crawford and part being held by J. M. Clark individually) for more than ten years past before the commencement of this action."

The record contains the following statement: "The complaint was dismissed as to Angus Douglass, D. L. Douglass, E. C. Douglass, and Ella Douglass, they neither having or claiming any interest in the lands. The case came on for trial at the November term of the court of common pleas (1899) for Chesterfield county before his honor, Judge Benet, and a jury, and the plaintiff offered testimony tending to show that the land described in the complaint, five hundred and fifty-seven acres, was granted to J. J. Schroter, December 23, 1827, the grant and plat thereto attached being introduced in evidence. Plaintiff also introduced testimony tending to show that at the death of the said Schroter, which occurred in the year 1846, he left a will by which he devised the said land to his daughter, Mrs. Ann Sutton, for her lifetime, and at her death to his granddaughter, Rosalie Sutton, the daughter of the said Mrs. Ann Sutton, and that this was the only land ⁴⁴⁴ devised to her. That the said Mrs. Ann Sutton died in the year 1893, and that thereafter the said Rosalie Sutton, in the year 1899, by deed conveyed the said land to the plaintiff herein, which said deed was introduced in evidence. The said Rosalie Sutton is still living. The defendants offered in evidence a grant to William White for one hundred and fifty acres, dated February 4, 1793, another grant to William White for six hundred and sixty acres, dated May 6, 1799, and a third grant to William White for five hundred and eighty-four acres, dated January 4, 1803. Testimony was then introduced tending to show that the above lands were sold by William White to William Reeder, and that there-

after the said lands were sold at a sheriff's sale, in the year 1827, as the lands of the said Reeder, and bid off by J. J. Schroter, who held possession until 1835, and then assigned his bid and directed this deed to be made to Edward Burch, to whom a deed was made by A. M. Lowry, sheriff, dated the 11th of September, 1835, and that said Burch deeded same to Neill Crawford, January 30, 1837. They also introduced a plat made by D. Feagan, surveyor, dated March 27, 1827, the surveyor's certificate thereon stating that it was made for J. J. Schroter, and was a plat of the Reeder lands under the William White grants hereinbefore set out. The field-notes of the surveyor corresponding with the plat were also introduced in evidence. The said plat contained two thousand four hundred acres, whereas on its face it purported to contain fourteen hundred acres. It was located by order of the court in this action, and it was shown that it covered the three William White grants and the land in dispute. The defendants also introduced evidence tending to show that in 1832 the said J. J. Schroter was sold out by the sheriff and placed in jail for debt, and introduced a deed from John Evans, as sheriff, to Hugh Crawford under said sale for the lands described as the Reeder or White lands; also a deed from Hugh Crawford to Neill Crawford for said lands. Testimony was also introduced tending to show that Neill Crawford was in possession of said lands from the date of his deed, in 1837, up to the time of his death, in 1897, and ⁴⁴⁵ that the defendants have been in possession thereof since said time. The plaintiff offered testimony tending to show that the land in dispute, to wit, the tract covered by the grant to Schroter, dated December, 1827, while included in the plat made by Feagan, was not covered by the White grants hereinbefore set out, but that the land in dispute was adjacent thereto and bounded on the east thereby. The plaintiff also offered testimony tending to show that after the death of the said Schroter, which occurred in 1846, all the other devisees under his will received and took possession of and still hold considerable tracts of land thereunder, but said tracts were not part of the grants which covered the lands in dispute. The plaintiff also offered testimony tending to show that those under whom the defendants claim did not hold possession of any part of the land in dispute until about 1861, and that the defendants had not held possession thereof for ten years next preceding the commencement of this action. . . . No question was made on the trial at any stage or presented to the judge in any way that the issues passed upon and

referred to in exceptions 4, 5, 7, and 9 were not raised in the pleadings."

The jury rendered a verdict in favor of the defendants. The plaintiff appealed upon exceptions, the first of which is as follows: "1. Because the circuit judge erred in charging the jury as follows: 'Because, if such be the case, that neither the plaintiff nor any of those through whom he claims (his grantors, predecessors, or ancestors) have been in possession at all in the last ten years, then the right of action would be barred, if the defendants have been in possession or any of them'; whereas, he should have added the proviso, that 'unless such plaintiff or the person through whom he claims was under some disability, such as infancy, lunacy, or, as in this case, having or claiming an estate in remainder after the death of another person during the lifetime of the life tenant.'" His honor, the presiding judge, used the language mentioned in this exception when stating to the jury what issues were raised by the ⁴⁴⁶ pleadings. The words which it is submitted should have been added as a proviso are nowhere to be found in the pleadings; and furthermore, if the presiding judge failed to state any of the issues, it was incumbent on the party to the action desiring to make this a ground of appeal to have called his attention to the omission. This exception is overruled.

The second exception is as follows: "2. Because the circuit judge erred in charging the jury as follows: 'Now you have heard the old saying, that "possession is nine points in the law," and it is well that it is so'—in that he gave undue weight to the fact of possession, and intimated his opinion in the case." The circuit judge immediately followed up this remark by the following explanation: "The law presumes that those in possession are rightfully in possession, and he who claims that they are unlawfully in possession has to satisfy the jury by the preponderance of the evidence that he has a good title, and a better title than the defendant. He is to recover by the strength of his own title." As thus explained, there was no prejudicial error, and the exception is overruled.

The third exception is as follows: "3. Because the circuit judge erred in charging the jury as follows: 'Therefore, if those who have an interest in the land, a claim of any kind in the land, sit silently by and let others set up their claims, and take possession and keep possession, for ten years, as to such people the law would turn a deaf ear and will not hear them. They have lost the right of action; they came into court too late.'

Whereas, he should have charged that neither the statute of limitations nor adverse possession will run against a remainderman until the termination of the life estate." Immediately preceding this remark, the circuit judge explained the law as follows: "You heard the expression in argument about a statute 'running,' that the statute will not 'run' or will 'run.' That is a technical term, very plain to the members of the bar, but not plain to intelligent jurors; but when the expression ⁴⁴⁷ is used that the statutes will run against some parties, it means that the time of the commencement, after ten years referred to; that the operations of the statute is having its effect; and if the statute runs for ten years, then the barrier is complete and the defense is established. It will not, of course, run against those who are unable to stop it, because people can stop the running of a statute. Those who have a claim for the land can assert their claim during the ten years, and if they can do so they will stop the running of the statute against them. Some cannot in law stop it. An infant, one under age, cannot. A lunatic could hardly do so. And so, also, a party as you have heard spoken of as remaindermen of a life estate may not be able to do so until the death of the life tenant. The statute, therefore, does not run against every person. It runs only against those who could, if they would, stop it. It could not run against those who legally have not the power to stop it, which shows that the law will take care of those only who cannot take care of themselves." When the language stated in the exception is considered in connection with the charge just mentioned, it practically gave to the appellant the benefit of the principle for which he contends, and the exception is overruled.

The fourth exception is as follows: "4. Because the circuit judge erred in charging the jury as follows: 'If the said Neill Crawford took possession of the land in dispute under claim of title, and held and claimed it as his own adversely before the death of John J. Schroter, and continued to so hold it until ten years expired from his first taking possession, the action would be barred by the statute of limitations,' when there was no such issue raised by the pleadings and before the court." In the case of *Busby v. Florida etc. Ry. Co.*, 45 S. C. 312, 23 S. E. 50, Mr. Chief Justice McIver, delivering the opinion of the court on the question, "Whether adverse possession of real estate for the statutory period confers a positive, affirmative title, or simply operates as a bar to the claim of any person seeking to dispossess the person in possession," says: "It is not to be de-

nied that at ⁴⁴⁸ one time it seemed to be supposed that adverse possession operated simply as a bar to an action to recover possession of the land. Accordingly, we find in the books the expression that the statute of limitations may be used as a shield of defense, not as a weapon of offense. But, on the other hand, we find in our own cases which will be hereinafter referred to, dicta, at least, which plainly recognize the doctrine that adverse possession of real estate for the requisite period does confer positive title, which may be asserted affirmatively." He quotes with approval the following language of Mr. Justice Miller, in *Campbell v. Holt*, 115 U. S. 622, 623, 6 Sup. Ct. Rep. 209, 210: "By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it or ownership superior in law to that of another, who may be able to prove an antecedent, and at one time paramount, title. . . . Mr. Angell, in his work on Limitations of Actions, says that the word 'limitation' is used in reference to the time which is prescribed by the authority of the law during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment, or the time at the end of which no action at law or suit in equity can be maintained. 'Prescription, therefore,' he says, 'is of two kinds; that is, it is either an instrument for the acquisition of property or an instrument of an exemption only from the servitude of judicial process.' . . . The English and American statutes of limitations have in many cases the same effect, and, if there is any conflict of decisions on the subject, the weight of authority is in favor of the proposition, that where one has had the peaceable, undisturbed, open, possession of real or personal property, with an assertion of his ownership, for the period which under the law would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has not lost him his title. This doctrine has been repeatedly asserted in this court (citing the cases). It is the doctrine of the English courts, and has been often asserted ⁴⁴⁹ in the highest courts of the states of the Union." Other cases are also cited to sustain this view, to which may be added *Duren v. Kee*, 50 S. C. 444, 27 S. E. 875, and *Cave v. Anderson*, 50 S. C. 293, 27 S. E. 693. By reference to the pleadings it will be seen that the plaintiff alleged he was the owner in fee of the land in dispute, and this allegation was denied in the answer of the defendants. Under this issue the plaintiff was bound to recover, if at all, upon the

strength of his own title and not upon the weakness of that of his adversary. The defendants had the right to defeat the plaintiff's recovery by pleading and proving the facts necessary to sustain the bar of the statute. They also had the right to show that the title was not in the plaintiff, but in themselves, or even in a person who was not a party to the action: *Faysoux v. Prather*, 1 Nott. & McC. 296, 9 Am. Dec. 691. If the defendants had a title to the land by adverse possession, it made no difference when it was acquired. They had the right under the issue made by the pleadings to offer it in evidence, not as a bar to the plaintiff's recovery, but to disprove the allegation of the complaint that the plaintiff held the title in fee, which the defendants denied. In a note on page 285 of 13 *Encyclopedia of Pleading and Practice*, we find the following: "In *Hill v. Bailey*, 8 Mo. App. 85, the court, in holding that a general denial of the plaintiff's title will admit evidence of adverse possession, said: The plaintiffs insist that the finding and judgment were erroneous, because the answer did not set up the statute in defense. When the statute is relied on as a bar to the remedy merely, it must be specially pleaded. The rule is ancient, and needs no citation of authorities to sustain it. But where the title to real estate is in question, the operation of the statute is found to have a higher range. It is capable of conferring an absolute title. Hence it has long been held that a general denial of the plaintiff's title will suffice for the admission of evidence of adverse possession for the statutory period; because this will not merely bar the remedy but may establish a title in the defendant, which will exclusively negative any ownership in the plaintiff. In ⁴⁵⁰ other words, it sustains and verifies the denial of the plaintiff's title: *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328. The rule is not confined to actions of ejectment. The reasoning upon which it is founded sanctions its application to any case, wherein the title to land is in dispute. There was, therefore, no error in admitting this defense under the general denial." While, technically speaking, the request which his honor charged was not responsive to the issue made by the pleadings as to the bar of the statute, we fail to see wherein it was prejudicial to the plaintiff, as the facts therein mentioned were sufficient to confer title upon the defendants. This exception is overruled.

The fifth exception is as follows: "5. Because the circuit judge erred in charging the jury as follows: 'If the statute began to run in the lifetime of John J. Schroter, no life estate

intervening would stop its currency, and if the defendants or those under whom they claim held adversely for ten years, which holding began during the lifetime of John J. Schroter, plaintiff's action would be barred,' when there was no such issue raised by the pleadings before the court." In disposing of this request; the presiding judge said: "I so charge you. There, again, the main point for you to decide is, if they held possession, did that possession take place or begin during the lifetime of John J. Schroter. A different law would apply, if it began after; but if it began during his lifetime and was kept up continually for ten years—part of the ten years being during his life and part after his death—then no life estate intervening would stop the running of the statute." The exception does not allege error in the propositions of law which were charged, but simply that there was no such issue raised by the pleadings. The defendants, as we have shown, had the right to prove title in themselves by adverse possession, and the charge was relevant to this issue. This exception is overruled.

The sixth exception is as follows: "6. Because the circuit judge erred in charging the jury as follows: 'If it began to run during his lifetime and was kept up continuously, for ⁴⁵¹ ten years—part of the ten years during his life and part after his death—then no life estate intervening would stop the running of the statute.'" No specific error is pointed out in this exception; but waiving this objection, it cannot be sustained. When the statute has commenced to run, no subsequent disability will arrest it: *Satcher v. Grice*, 53 S. C. 126, 31 S. E. 3; *Subrich v. Adams*, 20 S. C. 52. When rights are conferred upon others after the statute has commenced to run, and there is a new trespass while they are laboring under disability, they will not be barred of their right to bring an action based on the new trespass until their disability is removed: *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3. But there was no testimony in this case tending to prove a new trespass after the death of John J. Schroter, and within ten years after the statute began to run, if it began in his lifetime.

The seventh exception is as follows: "7. Because the circuit judge erred in charging the jury as follows: 'That if Neill Crawford held the land in dispute adversely and as his own for ten years before the death of John J. Schroter, any title that Schroter might have had was barred, and no title could have passed under any will he might have made relative there-

to,' when there was no such issue raised by the pleadings before the court." The exception is disposed of by what has already been said, and is overruled.

The eighth exception is as follows: "8. Because the circuit judge erred in charging the jury as follows: 'If John J. Schroter's right of action to recover the land from Crawford in his own lifetime was barred by the statute of limitations, then he had no right to leave the land or devise the lands in his will; and if he did so, then his devisee could not set up any higher claim than Schroter himself.'" No specific error is alleged in this exception. The words therein contained were used by the presiding judge in charging the request in the seventh exception. Immediately preceding the words in the eighth exception are: "That is the law. In other words." This exception is also disposed of by what ⁴⁵² has been said in considering the other exceptions, and is overruled.

The ninth exception is as follows: "9. Because the circuit judge erred in charging the jury as follows: 'The defendants ask the court to charge that the possession of a tract of land under a claim of title by virtue of a written instrument, sole or connected, for forty years before the commencement of the action, shall be deemed and is valid against the world.' The code holds that after forty years no action is allowed, after forty years' possession. That is another statute of repose. So that, unless the evidence shows you that the plaintiff or his ancestor or grantor was actually in possession of this property, or a part of it, within forty years from the commencement of the action, then his action would be barred, when there was no such issue by the pleadings and before the court; and in throwing the burden of proof on the plaintiff to show that he or those under whom he claimed had been in possession within forty years; when, if the issue had been properly raised, the burden was on the defendants to show that the plaintiff and those under whom he claimed had not been in possession within forty years." In so far as the question relates to the burden of proof, we see no reason for reversing the circuit judge. His charge did not have reference to this question, and, furthermore, is to be considered in connection with other portions of the charge, in which he stated what was to be proved by the respective parties.

We next come to the consideration of the other question, to wit, whether there was error in said charge by reason of the fact that there was no issue to which it was responsive raised

by the pleadings. Section 109 of the code is as follows: "Sec. 109. No action shall be commenced in any case for the recovery of real property, or for any interest therein, against a person in possession under claim of title by virtue of a written instrument, unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years ⁴⁵³ from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section, shall be deemed valid against the world after the lapse of said period." Section 94 of the code provides that "the objection that the action was not commenced within the time limited can only be taken by answer." It will be observed that the exception touching this question does not allege that there was error of law in the request or the language of the presiding judge charging it, nor that there was error by reason of the fact that the provisions of the code were inapplicable to the case. It had not been forty years since the code was adopted, when this action was commenced, and its provisions did not extend to cases where the right of action had already accrued: Code, sec. 93. In fact, section 109 of the code does not seem to have been enacted until several years after its adoption, as it does not appear in the Revised Statutes of 1873.

The request to charge, in itself, contains a general statement of the law applicable to the presumption of a grant, and would have been sound even if the word "twenty" had been substituted for "forty." It was, therefore, not prejudicial to the plaintiff's rights, and he cannot complain in that respect. The presumption of a grant gives title to the land: *Ellen v. Ellen*, 16 S. C. 132. It can be established without being specially pleaded, for the reasons hereinbefore stated. The request was, therefore, responsive to the issue made by the pleadings, and this would be sufficient to show that the exception cannot be sustained.

We will, however, consider the effect of the presiding judge's words in charging the request; and this involves a construction of section 109 of the code. This section may be divided into two parts. The first relates to the commencement of the action, and shows under what circumstances the plaintiff will be barred of his right to recover the land. The second has reference to the rights of the defendant, and practically confers upon him a title in fee after he has held possession of the land under the circumstances and for the ⁴⁵⁴ length of time therein

mentioned. A possession which "shall be deemed valid against the world" is tantamount to the fee; otherwise the last sentence in said section would be meaningless. The length of time necessary to bar the plaintiff's right of recovery, and to confer title upon the defendant, is the same in each case. In order to defeat the plaintiff's right of recovery, the defendant would be compelled to prove every fact that would have to be established, to show that he had become the owner of the title by virtue of that section of the code. It is true, the objection that the action was not commenced within the time limited should be taken by answer, but as the facts necessary to sustain such defense would be sufficient to confer title on the defendants, which could be proved under a general denial, we fail to see wherein the charge was prejudicial to the plaintiff. This exception is overruled.

The tenth exception is as follows: "10. Because the circuit judge erred in charging the jury, in substance, that the defendants could tack the time during which they had held possession with the time during which those under whom they claim held possession, so as to complete the statutory terms of adverse possession." This is allowed under section 109 of the code; also, in establishing the presumption of a grant: *Ellen v. Ellen*, 16 S. C. 132, and cases therein cited. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

ADVERSE POSSESSION — REMAINDERMAN.—The possession of a life tenant is never deemed adverse to the remainderman: *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702.

STATUTE OF LIMITATIONS, RUNNING OF.—Where the statute of limitations has commenced to run, subsequent disabilities do not suspend its operation: *Williams v. Long*, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264. Death does not interrupt the running of the statute: *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; *Grether v. Clark*, 75 Iowa, 383, 9 Am. St. Rep. 491, 39 N. W. 655.

TITLE TO LAND BY ADVERSE POSSESSION is as effectual for the purposes of remedy or defense founded upon it as that created in any other manner: *Greene v. Couse*, 127 N. Y. 386, 24 Am. St. Rep. 458, 28 N. E. 15.

have done. Under these circumstances, there does not seem to be any substantial distinction between a partition by agreement and a partition by suit in reference to this ⁵⁷⁰ question. Since a partition in kind in a judicial proceeding would not bar the wife of her dower, there is, then, no reason to suppose that a partition by agreement would. But it is said that while the husband, during his seisin, might enter into such a partition without barring the wife's inchoate right of dower, the husband's alienee could not. We fail to realize the force of this contention. The husband's alienee is privy to the husband, is in under the husband's seisin, and must have the husband's right of partition as cotenant. Speaking of the situation of an alienee of the husband prior to the partition, in *Holley v. Glover*, 36 S. C. 404, 31 Am. St. Rep. 883, 14 S. E. 605, the court said: "It seems to us that the conveyance to Wise Holley placed him in the shoes of Alford Holley, invested him with the same seisin, subject to the same qualifications with which his grantor, Alford Holley, had previously been invested, and made him a tenant in common with the other joint owners of the land." While the wife of a cotenant would be barred of her inchoate right of dower by a sale under the paramount right of partition, it would not be barred by a partition in kind. In the former case, the sale is incident to the enforcement of a paramount right, and this paramount right protects the title of a purchaser at such sale against the subordinate right of dower, and leaves no seisin to which the dower may attach. In the latter case, after the paramount right is consummated by partition in kind, there is still left a seisin in the husband, or his privy, of the property subject to the inchoate right of dower.

2. This brings us to the next question, as to what land is subject to the right of dower in this case, and the extent of the right in the designated tracts or lots. In this matter we disagree with the circuit court, and hold that the plaintiff is entitled to dower in accordance with her contention, not in the entire tract of twelve hundred and nineteen acres, as if no partition had been made, but in the portions of said tract which were assigned to Samuel Jefferies, the alienee of the plaintiff's husband in the said partition; that is to say, as to lot No. 3, plaintiff is entitled to one-sixth for life of each subdivision ⁵⁷¹ thereof, and as to lot No. 7, she is entitled to one-third for life of each subdivision thereof. The wife's right depends upon the seisin of the husband and must follow the husband's seisin. When the husband is a tenant in common, the seisin being of

an undivided interest, the dower is of such undivided interest. When, however, there is a lawful partition in kind, as in this case, the husband's seisin of an undivided interest is converted or transmitted into a seisin of the specific portion assigned. This must result from the right of partition among cotenants, which necessarily compels a shifting or transmutation of the seisin of each in an undivided interest to a seisin in severalty by metes and bounds. Under this view, the interest in severalty assigned under partition to the other cotenants is free from the claim of dower, since they hold not by virtue of any right derived from the plaintiff's husband, but by virtue of the paramount right of partition, which designates their own seisin by metes and bounds. Whereas, on the other hand, Jefferies takes by partition only what he derives from the plaintiff's husband, and, of course, must take subject to the plaintiff's dower. Jefferies having received in the partition what represents the whole seisin of the plaintiff's husband, he and those claiming under him should hold subject to the full claim of plaintiff's dower.

The judgment of the circuit court is reversed, and the case is remanded for further proceedings, in conformity with the view herein announced.

Dower—Effect of Partition.

Voluntary Partition.—If the interest which a married woman has in the lands of a cotenancy is not that of a cotenant, but only a right of dower arising from the fact that her husband is a cotenant, the right of the wife to dower does not depend upon the making of a partition of the premises, but exists antecedent to such partition. However, it is not paramount to the right of the cotenants of her husband to compel a partition, and it does not, in any manner, interfere with nor impair his authority to make a valid partition by voluntary deed or agreement. If he perfects a voluntary partition, in good faith, the dower interest of his wife is thereby removed from the purparties of the other cotenants, and confined to the premises allotted to the husband on the partition: *Potter v. Wheeler*, 13 Mass. 504; *Lloyd v. Conover*, 25 N. J. L. 47; *Blossom v. Blossom*, 9 Allen, 254; *Huntington v. Huntington*, 9 Civ. Proc. Rep. 182; *Totten v. Stuyvesant*, 3 Edw. Ch. 500; *Freeman on Cotenancy and Partition*, sec. 411. If a woman marries a man entitled to an undivided share in lands, and after marriage a valid voluntary partition is made by him, she is entitled to dower in the share partitioned or set off to her husband only, and not in his undivided share of the whole: *Lloyd v. Conover*, 25 N. J. L. 47. Married women seeking to assert dower rights "will be restricted, both in law and equity, to the allotments of their husbands, and

will be estopped from seeking to have dower assigned on undivided shares of other parcels. By confining them to the equal shares which their husbands take in the partition, they have all the power the law gives them": *Totten v. Stuyvesant*, 3 Edw. Ch. 503. While a wife has an inchoate right of dower in land owned jointly by her husband with another, she need not join in a deed of partition executed by him, as she takes her dower in the part which is assigned to him: *Napper v. Mutual Life Ins. Co.*, 21 Ky. Law Rep. 791, 53 S. W. 28.

The rule as sustained by the authorities is that persons holding lands in cotenancy may, by interchange of deeds, or by agreement either with or without the consent of their respective wives, make a partition of the lands, and a partition thus made by them, if fair and just, and equal, quantity and quality considered, is as binding upon the wives as upon themselves, and their right of dower then attaches to the shares assigned to their respective husbands, but if fraud upon the wives is attempted by purposely making an unequal partition, it is not binding upon them: *Huntington v. Huntington*, 9 Civ. Proc. Rep. 182. In this case the court said: "The principle underlying the cases seems to be that partition is an absolute right, to which inchoate dower rights are subordinate; that as it may be compelled by law, it may be done voluntarily; that as judgment in partition only severs the unity of possession, and does not confer any new title, so an amicable partition by interchange of deeds has the same effect; and that as the husband's title is not affected, the wife's right depending on and attached to that title is not affected": *Huntington v. Huntington*, 9 Civ. Proc. Rep. 191. If, however, a husband exercises his power of making a voluntary partition, for the purpose of destroying his wife's rights, or of accomplishing a fraud upon her, he is acting contrary to law, and the reason for holding his wife bound by his partition fails: *Potter v. Wheeler*, 13 Mass. 507. A voluntary division of lands held by cotenants in equal proportions limits the right of dower which may accrue to either of them to the part set apart to her husband, but there is no such limitation to her right, if, for a valuable consideration, the division is purposely made in unequal proportions. Hence, if one of such cotenants makes partition, taking the smaller and less valuable purparty, and receives a compensation for so doing, the wife's right to have her dower assigned is not restricted to the part allotted her husband: *Mosher v. Mosher*, 32 Me. 414.

It has been held that a husband's right by voluntary partition to prescribe limits to his wife's inchoate right of dower does not vest in his grantee, and hence that if a husband conveys to a third person, who during the life of the husband has land set off in severalty to himself, the wife, after her husband's death, may have her dower assigned out of the whole tract, as if no partition had been made: *Rank v. Hanna*, 6 Ind. 20.

If two persons owning land in cotenancy divide it, and one of them, while in the exclusive occupation of her part, conveys it to a third person, both of such cotenants joining in the conveyance, although the deed is prima facie evidence that they were tenants in common of the part conveyed, yet the exclusive occupation of one of them and the purchase from him is evidence of his seisin of the whole which entitles his widow to dower out of the whole of his part as originally divided between the cotenants and not merely in a moiety of such part: *Dolf v. Basset*, 15 Johns. 21.

Involuntary Partition.—In proceedings in partition, either at law or in equity, the inchoate right of dower of *femes covert*, whether infants or adults in the undivided shares of their husbands in the lands, is divested by a sale under the judgment or decree of the court, so as to protect the purchasers against the dower of such *femes covert*, if they survive their husbands, provided such wives are made parties to the proceedings. The cases everywhere agree upon this, although there is some conflict as to the effect of a partition sale when the wife is not made a party to the proceedings. In the following cases she was made a party: *Jackson v. Edwards*, 7 Paige, 386; affirmed, 22 Wend. 498; *Jordan v. Van Epps*, 19 Hun, 526; affirmed, 85 N. Y. 427; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355; *Warren v. Twilley*, 10 Md. 39; *Rowland v. Prather*, 53 Md. 232. Thus, if in an action to recover a dower interest in land, it appears that there exists a judgment rendered in an action for partition of such lands in which the *feme covert* claims her dower, and that she was duly served and made a party defendant in such action, but failed to appear, it must be held that such judgment is a bar to the action for dower, although such judgment fails to make any provision for dower: *Jordan v. Van Epps*, 85 N. Y. 427. This case overrules the early case of *Bradshaw v. Callaghan*, 5 Johns. 80, which maintains an exactly contrary doctrine.

Although there is some conflict of authority as to whether a wife is a necessary party to partition proceedings between co-owners of land, the vast majority of the decisions of courts of last resort establish the rule that the seisin of a husband who acquires title to land as a tenant in common with others is subject to the paramount right of his cotenants to demand partition in an action brought for that purpose. His wife's right of dower therein is therefore subordinate to that paramount right, which, when enforced by a sale made under a decree of the court, defeats her inchoate right of dower in the land, although she was not made a party to the action of partition. Hence, in a partition suit between cotenants, the wife of one of them is not a necessary party, and in the event of a partition sale of real estate in a proceeding wherein such wife was not made a party, she is bound by such proceedings and sale, though she outlives her husband and becomes his surviving widow, for her inchoate right to one-third of her husband's land subsists

by virtue of his seisin, and is always subject to any encumbrance, infirmity, or incident which the law affixes to the seisin, either at the time of the marriage or at the time her husband becomes seised, and liability to be divested by a partition sale is an incident which the law affixes to all estates in cotenancy. For these reasons the courts almost universally hold that a sale of land for the purpose of partition bars the inchoate right of dower of the wife of one of the joint tenants or tenants in common, and the purchaser takes a clear title to the land: *Davis v. Lang*, 153 Ill. 175; 38 N. E. 635; *Holley v. Glover*, 36 S. C. 404, 31 Am. St. Rep. 883, 15 S. E. 605; *Mitchell v. Farrish*, 69 Md. 235, 14 Atl. 712; *Williams v. Wescott*, 77 Iowa, 332, 14 Am. St. Rep. 287, 42 N. W. 314; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262; *Sire v. St. Louis*, 22 Mo. 206; *Hinds v. Stevens*, 45 Mo. 209; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355; *Haggerty v. Wagner*, 148 Ind. 625, 48 N. E. 366. A sale of land in partition proceedings is a judicial sale, and such a sale of a husband's interest in lands in a proceeding to which he is a party extinguishes the wife's right of dower therein, although she was not made a party to the proceeding. *Williams v. Wescott*, 77 Iowa, 332, 14 Am. St. Rep. 287, 42 N. W. 314. The leading case on the subject is *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355, wherein the court said: "We are of opinion that it was the intention of the legislature, by sale in partition, to divest the wife of her inchoate right of dower. In so holding we do not subject this right at all to the will or caprice of the husband. The sale is the act of the law, designed to do justice to joint owners, and render estates available, and put forth only when, from the fact that the estate is incapable of actual partition, the necessity of the case requires it. The legislature has deemed it more important to the public interests to render estates available to their owners without sacrifice of their values, by a sale in case of necessity, than to preserve in all cases whatsoever the wife's remote and contingent interest, at the expense of parties on whom she can have no proper claim. The fact that the wife was not a formal party to the proceeding in partition does not, we think, at all alter the case. The terms of the statute do not require that she should be made a party, and we see no good reason why it should be required. On the whole, our view of the question is this: The right of dower in the wife subsists in virtue of the seisin in the husband, and this right is always subject to any encumbrance, infirmity, or incident which the law attaches to that seisin, either at the time of the marriage or at the time that the husband became seised. A liability to be divested by a sale in partition is an incident which the law affixes to the seisin of all joint estates, and the inchoate right of the wife is subject to this incident; and when the law steps in and divests the husband of his seisin, and turns the realty into personalty, she is, by the act and policy

of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personality into which it has been transmitted." This language has been adopted by many other courts: *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635; *Haggerty v. Wagner*, 148 Ind. 625, 48 N. E. 366. It was held, however, in *Hinds v. Stevens*, 45 Mo. 209, that it is unnecessary to make the wife of a person interested in the partition of lands a party to a proceeding for a partition thereof. And if in such case the land is divided in specie, her inchoate right to dower attaches at once to her husband's share, but if it is sold she has no claim to any portion of the proceeds. In the case of *Holley v. Grover*, 36 S. C. 404, 31 Am. St. Rep. 883, 15 S. E. 605, the court said: "As to the first question, we are of opinion that while the wife of one of several cotenants has an inchoate right of dower in her husband's portion of the real estate held in common, yet such right is subordinate to the paramount right of the other tenants in common to have partition of the common property in any of the modes by which such partition may be lawfully made. Hence, if a sale for partition becomes necessary, the wife's inchoate right to dower in the land is barred, even though she is not a party to the proceeding for partition, and the purchaser at such sale takes his title disencumbered of such subordinate right of dower."

If a husband holding land as a tenant in common, in which his wife has an inchoate right of dower, conveys his interest to another person, and the land is thereafter sold under a decree in partition to which the husband is a party, but not the wife, such right of dower is defeated, not because the husband was not the wife's representative, but by the exercise of the right of partition, which is paramount to it. The wife is not a necessary party to such action: *Holley v. Glover*, 36 S. C. 404, 31 Am. St. Rep. 883, 15 S. E. 605. It has been held, however, that the wife's inchoate interest in her husband's lands is not lost by mortgage of such lands by him and foreclosure sale thereunder, where the wife is not a party to the mortgage, and the fact that the land was afterward sold on partition, to which the widow was not a party, does not divest her of her contingent interest and right to dower: *Verry v. Robinson*, 25 Ind. 14, 87 Am. Dec. 346.

Among the cases which maintain the doctrine that if a husband is seised of an undivided interest in lands, a sale thereof under a decree in partition proceedings, to which he was, but she was not, made a party, does not bar her right of dower, is *Greiner v. Klein*, 28 Mich. 12, in which the court said, through Mr. Justice Graves, that: "After the best consideration I have been able to give to the subject, I arrive at the conviction that the sale in partition, when the wife was not a party, was analogous to a private sale or alienation by the husband alone, and was not a bar to her right, that we are not authorized to say that the legislature meant to cut off the right through a sale in partition proceedings to which the

wife was not a party, and that the court of chancery has power in partition proceedings to guard her right without departing from its principles": Greiner v. Klein, 28 Mich. 24. In Royston v. Royston, 21 Ga. 161-172, the court said that "neither the husband nor the courts, nor any other human power, can compel the wife to relinquish her right of dower, inchoate though it may be, when she is not asking the aid of the court." A number of early New York cases also maintained that a married woman whose husband is the owner of an undivided interest in lands held in common is a necessary party to a suit for the partition of the premises, and in case she was not made a party to or joined in such suit, a sale of the land under a decree in the partition proceedings did not bar her right of dower: Green v. Putnam, 1 Barb. 500; Jackson v. Edwards, 7 Paige, 386; Van Gelder v. Post, 2 Edw. Ch. 577; Matthews v. Matthews, 1 Edw. Ch. 565. In Wilkinson v. Parish, 3 Paige, 653, it was held that the purchaser of premises sold under a decree for partition took the land subject to the right of dower of the wife of one of the tenants in common, unless she was a party to the suit, and where an actual partition is made, the wife's dower attaches to the portion of the premises allotted to her husband. In this case, the court said: "As a feme covert cannot be bound by a decree against her husband in a partition suit to which she is not a party, it seems proper, in all cases, where a sale of the premises will be necessary, that the wife should be joined with her husband as a party in the suit, so that the purchaser's interest in the premises may not be charged with the encumbrance of her contingent claim of dower": Wilkinson v. Parish, 3 Paige, 658. Such was the conclusion of the courts of New York up to the year 1840, at which time a statute was enacted in that state providing for the making of the wife a party to such actions, and that in case of the sale of the premises, including a dower right, the interest shall pass to the purchaser, and that from the proceeds of the sale a sum in gross shall be paid to the person entitled to dower. Provision is also made for ascertaining and settling the proportionate-value of the inchoate right to dower in such cases: Jordan v. Van Epps, 85 N. Y. 433; Freeman on Cotenancy and Partition, sec. 474.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

POINDEXTER v. RAWLINGS.

[108 Tenn. 97, 59 S. W. 768.]

VENDOR AND PURCHASER — VENDOR'S LIEN — NEW PROMISE.—The renewal of a purchase money note given for land, or a new promise within six years after its maturity, is sufficient to prolong the life of the vendor's lien, and, as against the vendee in possession, put the statute of limitations in operation against it, only from the maturity of the renewal or from the date of the new promise.

VENDOR AND VENDEE — VENDOR'S LIEN — ESTOPPEL BY SURRENDER OF OLD DEED AND EXECUTION OF NEW ONE.—If a husband, who is a joint grantee with his wife, returns the deed to the grantor and obtains a new one executed to the wife alone, under which she takes possession and claims title, such transaction passes no additional interest to her, but estops her from asserting ownership under the original deed, and estops her husband from asserting his joint interest as against her, and hence he has no interest in the land subject to the vendor's lien.

ADVERSE POSSESSION — TITLE TO SUPPORT.—If a husband, who is a joint grantee with his wife, returns a deed to his grantor, and procures a new one executed to her alone, under which she takes possession and claims title, the second deed purporting to convey the fee, although it passes no additional title to the wife, constitutes good color of title on which to base adverse possession.

VENDOR AND PURCHASER—VENDORS' LIENS—STATUTE OF LIMITATIONS.—If a husband, who is a joint grantee, gives his individual notes for the purchase money of the land conveyed, and returns the deed to the grantor and procures a new one executed to the wife alone, under which she takes possession and claims title, the vendor's lien for the unpaid purchase price follows the land into her hands, and her possession is in subordination thereto until the maturity of purchase money notes, at which time the statute of limitations begins to run against them; and, although she has knowledge when she takes possession that her husband owes for the land, the fact that he acted as her agent in pro-

curing the second deed, or that he had made renewals or new promises as to such notes, to which she was not a party, and of which she had no knowledge, does not prevent such running of the statute of limitations against the vendor's lien.

VENDOR AND PURCHASER—VENDOR'S LIEN—STATUTE OF LIMITATIONS.—The possession of a vendee cannot become adverse, and the statute of limitations cannot begin to run against the vendor's lien for the unpaid purchase price, until the maturity of the notes given therefor. The statute does not begin to run from the execution of the deed.

Huffmaster & Chestnutt, for Poindexter, appellant.

J. R. Penland, for Rawlings, also appellant.

99 **CALDWELL, J.** This is a bill to collect balance of purchase money for land, and to enforce the vendor's equity.

In 1883 the complainant, Martha A. Poindexter, sold and conveyed a tract of land in Sevier county to the defendants, A. P. Rawlings and his wife, Mary S. Rawlings, for the consideration of two thousand five hundred dollars, one-half thereof being paid in cash, and the other half being covered by three notes of A. P. Rawlings, maturing in 1885, 1886, and 1887, respectively. Upon the maturity and payment of the first note, in 1885, A. P. Rawlings returned the original deed to the vendor, and she, at his request, executed another deed in its stead, conveying the land to his wife, Mary S. Rawlings, alone. This deed, like the former one, merely recited a consideration of two thousand five hundred dollars "in money and notes," and made no express reservation of a lien. The second and third notes were renewed from time to time by A. P. Rawlings, and when this bill was filed in August, 1899, he still owed on them an aggregate of more than eleven hundred dollars.

On the foregoing facts the complainant sought to collect the balance of purchase money due her by an enforcement of her vendor's equity in the land.

100 A. P. Rawlings pleaded the statute of limitations of six years in bar of a recovery on the older of the two renewals, and, with his wife, also pleaded the statute of seven years in bar of the vendor's equity in the land.

The chancellor and the court of chancery appeals successively overruled the former plea and sustained the latter one; and then pronounced a decree against A. P. Rawlings, personally, for the whole balance of unpaid purchase money, but refused a sale of the land, upon the ground that the vendor's equity therein was barred before the filing of the bill.

The complainant has appealed from so much of the decree of the latter tribunal as denied her a sale of the land for her debt, and A. P. Rawlings from that part overruling his plea of the statute of limitations as to the older renewal.

It appears from an inspection of the older of the two renewal notes that it was a few months more than six years past due when the bill was filed, and, consequently, that, in the absence of other proof, the complainant's action thereon was barred by the six years statute. But the court of chancery appeals found as a fact from other proof in the record that A. P. Rawlings had within that period promised to pay that note. That finding is conclusive; and the new promise, being distinct and definite, arrested the running of the statute, saved the action from its bar, and ¹⁰¹ justified the recovery on that note. There is no question as to the correctness of the recovery on the other note.

What effect, if any, did the renewals and new promise have on the operation of the seven years statute against the vendor's equity in the land?

It has long been settled in this state that the vendor's equity will be barred by the vendee's continuous possession of the land under an absolute deed for a period of seven years after the maturity of the debt: *Sheratz v. Nicodemus*, 7 Yerg. 8; *Thompson v. Thompson*, 3 Lea, 126; *Hughes v. Brown*, 88 Tenn. 578, 13 S. W. 286.

In the intermediate case of *Fisher v. Fisher*, 9 Baxt. 71, it was said that the vendor's equity was extinguished by the bar of the debt in six years.

Whether the renewal of a purchase money note, or a new promise within six years after maturity, will also prolong the life of the vendor's equity and put the statute in operation against it only from the maturity of the renewal, or the date of the new promise, has not been decided, except, possibly, by implication of an affirmative nature in the concluding portion of the opinion in the *Thompson* case just cited. We are fully persuaded, however, that it will produce that result as to the vendee in possession, and now so rule. The vendee's possession is presumably in subordination to the vendor's equity, whenever liability ¹⁰² for unpaid purchase money is so acknowledged and extended, and, as a consequence, the period of limitation cannot rightfully be computed back of that time, because the statute never runs in favor of a subordinate holding. The continued acknowledgment of the debt by formal renewal or dis-

inct and definite promise is from its nature, unless qualified, likewise a continuing recognition of the vendor's equity. It is a matter of conscience and legal duty that the vendee pay for the land he buys; hence, so long as the possession is coupled with renewed confessions of liability for purchase money, his holding will be regarded as in harmony with the vendor's equity, and not in antagonism to it, unless he make some affirmative expression to the latter effect.

It follows, therefore, that the renewals and new promises by A. P. Rawlings, being made without qualification or reservation against the vendor's equity, had the effect not only of extending his legal responsibility for the notes, but also of prolonging the life of that equity, of arresting and postponing the operation of both statutes so far as he was concerned; and that the complainant's right to enforce her equity against any interest he might then have in the land was not barred, but available at the time she filed her bill.

His interest, under the deed of 1883, was that of tenant by the entirety with his wife, the conveyance being to them jointly, and the complainant ¹⁰⁸ now has the right to subject that interest to sale for the payment of her debt, unless it should appear that it subsequently passed out of him, or was waived in such manner as to defeat her equity in it.

He has never in fact conveyed his interest to anyone; nor was the return to the vendor of her deed to him and his wife efficacious in law to divest them of their title and revest it in the vendor: *Howard v. Huffman*, 3 Head, 563, 75 Am. Dec. 783.

The complainant, therefore, had no title to impart when she executed the deed to Mrs. Rawlings in 1885, and, of course, Mrs. Rawlings acquired no title as such thereby. Nevertheless, the surrender of the first deed by A. P. Rawlings to the vendor, and her execution of the second one in its stead to his wife by his request, and her claim and possession thereunder, preclude him in equity from now claiming any interest in the land as against his wife, and the same facts likewise preclude the complainant from now asserting that A. P. Rawlings has any interest under the first deed to which her vendor's equity can attach. As against his wife he no longer has an interest in the land as vendee, and the complainant for that reason can have no relief against the land as his property.

How, then, if at all, did the renewals and new promises by A. P. Rawlings affect the vendor's equity in the land as the

exclusive property of ¹⁰⁴ his wife? The court is relieved of the necessity of considering their influence upon the equity in her original interest as joint vendee with her husband under the first deed, for the facts that have just been held to exclude all idea of present ownership in him under that instrument are equally potent in disproving such ownership in her. For the purpose of this litigation at least, her present ownership must be regarded as having arisen under the second deed alone. Though that instrument, for lack of title in the vendor at that time, passed no title to Mrs. Rawlings, it nevertheless worked an estoppel on all the parties to the transaction; and as it purported to convey the fee, it was also good color of title upon which to base adverse possession. However, as she accepted that deed without paying for the land herself, and with ample knowledge that her husband then owed the two immature purchase money notes, the vendor's equity for those notes undoubtedly followed the land into her hands, and her possession in its inception was, as that of the real vendee, in subordination to that equity until the notes matured. This is true whether she be regarded as a subvendee with notice (*Sheratz v. Nicodemus*, 7 Yerg. 8; 2 Story's Equity Jurisprudence, sec. 1217), or as a mere volunteer (*Robinson v. Owens*, 103 Tenn. 91, 52 S. E. 870), which she really was; and it is equally true that the seven years statute began its operation in her favor and against ¹⁰⁵ the vendor's equity in the first instance, as it would have done as to the real vendee, not when she received her deed and took possession in 1885, but as to the equity for one note when it matured in 1886, and as to the equity for the other note when it matured in 1887. Therefore, the possession that Mrs. Rawlings acquired and held for herself alone under her deed, from the time of its execution in 1885 to the filing of the bill in 1899, thirteen years and twelve years, respectively, after the maturity of the original notes, was effective, under the seven years statute, not only to extinguish all interest of her husband as joint vendee under the first deed, but also for the extinguishment of the vendor's equity that followed the land into her hands, unless her husband's renewals and new promises arrested the statute and kept the equity alive against her, as they would have done against him if he had owned the land when they were made.

Obviously, the mere renewals and new promises, as such, and without more, were not productive of such result, she not being a party to them. She could not be deprived of the ordinary legal consequences of her possession by the independent and

individual act of her husband, nor prejudiced in her separate rights without some act of her own. Participation on her part in the extension of the notes, or her assent to it, would doubtless have given the same extension to the vendor's ¹⁰⁶ equity; but the burden of showing such participation or assent was upon the vendor. No such fact was shown. Indeed, the record fails to show that Mrs. Rawlings was in any way even cognizant that the renewals and new promises were made. It results that she is not affected by them, and that the period of limitation in her favor must be computed from the maturity of the original notes. When that is done, it appears that the statute had more than completed its full course against the separate equity of each of these notes at the time the bill was brought, and consequently that the complainant then had no right to have the land sold for the satisfaction of the unpaid purchase money.

It is contended in behalf of the complainant that A. P. Rawlings was the agent of his wife in surrendering the first deed and procuring the second one, and that statements then made by him to the effect that the land would thereafter remain bound for the unpaid purchase money as in the first instance were binding upon her as his principal, and hence that she should not now be heard to deny the existence of the vendor's equity.

The most that can be made of the facts thus contended for is that Mrs. Rawlings took the land in 1885 subject to the vendor's equity. The court has no doubt, and has already ruled, that she did so take it. The contention does not embrace ¹⁰⁷ the further proposition that her husband after that time, or when the renewals and new promises were made, undertook as her agent to extend the life of the vendor's equity; and if it did, there is no proof of the fact. That Mrs. Rawlings knowingly took the land at the outset subject to an equity in favor of the complainant for unpaid purchase money does not imply that she thereby became bound to so hold it for all time. On the contrary, the implication is that her holding was to be subordinate to that equity only so long as the notes then outstanding remained immature, until suit might be brought to collect them and enforce the equity; and to rebut that implication it was incumbent on the complainant to show additionally some act or course of conduct on the part of Mrs. Rawlings sufficient to make an extension of the equity beyond its original scope of time. Renewals of the notes and new promises by her husband without her knowledge, though he may have acted as her agent in the first instance, are not sufficient for that purpose.

Though it pronounced a correct decree upon the facts of the case, the court of chancery appeals was in error when it said, in its opinion on the law, that the mere execution of a deed and delivery of possession thereunder establish an adversary relation between the parties as to unpaid purchase money, and that "from that day the ¹⁰⁸ statute of limitations of seven years begins to run in favor of the vendee against the vendor." In reality, as has been seen, the possession of the vendee does not become adverse, and the statute does not begin to run against the vendor's equity, until the maturity of the purchase money debt, until the vendor has a matured right of action for his debt, and for the enforcement of his equity. It was so decided in the cases cited on that subject in a former part of this opinion.

Let the decree be affirmed.

A VENDOR'S LIEN FOLLOWS THE LAND when conveyed by the vendee to one with notice: See the monographic note to *Hutzler Bros. v. Phillips*, 4 Am. St. Rep. 705.

VENDOR'S LIEN.—THE RENEWAL OF A NOTE given for the purchase price of land is not a waiver of the lien therefor: Note to *Honore v. Bakewell*, 43 Am. Dec. 153; *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209. See, too, note to *Bell v. Pelt*, 14 Am. St. Rep. 61.

ADVERSE POSSESSION.—CLAIM OF TITLE, however groundless, makes a possession adverse, and such possession will ripen into title. Whether an adverse possession is under a good or bad, legal or equitable, title is immaterial: See the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 490.

ADVERSE POSSESSION.—A VENDEE in possession of land under a contract of purchase does not hold adversely to the vendor, so long as the purchase money remains unpaid: *Long v. Kansas City Stockyards Co.*, 107 Mo. 298, 28 Am. St. Rep. 413, 17 S. W. 658.

SULLY v. CHILDRESS.

[108 Tenn. 109, 60 S. W. 499.]

NEGOTIABLE INSTRUMENTS — MAKERS, WHEN BECOME SURETIES.—The makers of a note become sureties to one who assumes its payment for them, or to one who, after such assumption and with knowledge thereof, takes an assignment of the debt.

SURETYSHIP — EXTENSION OF TIME OF PAYMENT.—If the principal in a note, at or after maturity, contracts with his creditor for delay in full payment, without the knowledge of the sureties, in consideration for paying part of the indebtedness, the

contract is without consideration, and neither binds the creditor nor discharges the sureties. It is immaterial that such payment is made the day before the maturity of the note, when the contract of the holder and principal in the note is that the payment shall be made at its maturity.

LIMITATION OF ACTIONS — PLEADING — ABSENCE FROM STATE.—If absence of a party from the state is set up to defeat a plea of the statute of limitations, such absence must be specifically alleged. An allegation that the cause of action, "while apparently barred by the statute of limitations, is not in fact barred, but in full force," is wholly insufficient.

APPELLATE PRACTICE ON OVERRULING FORMER DECISION — REMAND FOR AMENDMENT OF PLEADING.—The supreme court may remand a case for the amendment of the pleadings, if it appears that a party has followed and been misled in making up issues by a former opinion of the court, which is overruled in the case at issue.

Kirkpatrick, Williams & Bowman, for the appellant.

I. Harr, for the appellee.

110 McALLISTER, J. This bill was filed to collect balance due on a note for seven hundred and fifty dollars executed by defendants, B. F. Childress and J. H. Preas, to the Carnegie Land Company, and by the latter company indorsed to Alfred Sully, the present complainant. This note was part of the consideration to be paid by Childress and Preas for four lots purchased by them from the Carnegie Land Company, for the sum of three thousand dollars. Two deeds were executed and a lien retained by the company for the balance of purchase money.

It appears that at the time Preas and Childress received these deeds from the land company they had negotiated a sale of the lots to one Selden Langley at a profit of one thousand dollars, which was paid in cash. Langley also made, it appears, the cash payments to the land company due from ¹¹¹ Preas and Childress, and Langley also assumed payment of deferred purchase notes. It further appears that Preas and Childress executed a deed to Langley for the four lots, in which they retained a lien for their own indemnity. Langley, it appears, failed to pay one of the notes executed by Preas and Childress to the Carnegie Land Company, and thereupon this bill was filed for its collection.

As already stated, the suit is brought by Alfred Sully, to whom the Carnegie Land Company indorsed the note. Suit as to Preas was dismissed.

The defendant, Childress, resisted the collection of the note upon two grounds: 1. That he was released by an extension

granted to Langley; and 2. Because the note sued on is barred by the statute of limitations of six years.

The note on its face appears to have been executed by James H. Preas and B. F. Childress, as makers, to the Carnegie Land Company. Upon the back of the note appears the following indorsement, viz.: "I assume and agree to pay the within note. Selden Langley." Again: "Pay to the order of Alfred Sully. Carnegie Land Co., by J. T. Wilder, Prest."

The court of chancery appeals properly held, upon the facts and the law, that, as between all parties concerned, Langley was principal on the debt sued on, and Preas and Childress were sureties: ¹¹² Union Life Ins. Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. Rep. 437.

When the note in suit matured—December, 1890—it was owned by Alfred Sully. He also owned the other note of seven hundred and fifty dollars, maturing at the same time. On the 17th of March, 1891, Langley mailed his check for twelve hundred dollars to the Citizens' Bank of Johnson City, where the notes were deposited for collection. The bank applied seven hundred and ninety-five dollars of this sum to take up one of the seven hundred and fifty dollar notes, with interest thereon, and applied the balance of four hundred and five dollars on the note now in controversy, which left a balance of three hundred and ninety dollars and interest due on the latter note. It should be remarked that the four hundred and five dollar credit is dated March 19, 1891, one day prior to the maturity of the note.

The insistence made in the court below and here was that Childress was released as surety on said note, for the reason there was a contract between Sully, the holder, and Langley, the principal, for an extension of ninety days, in consideration of the cash payment of twelve hundred dollars on the two notes, and that this contract was made and the credit paid before the maturity of the note.

It is well settled that if the creditor grant an extension of the time of payment upon a valid consideration, for a definite and fixed period, to the principal debtor, to the prejudice of the surety and without his consent, it will operate to release the surety from his liability: Bank v. Matson, 99 Tenn. 394, 41 S. W. 1062; Foy v. Sinclair, ¹¹³ 93 Tenn. 296, 30 S. W. 28. It is also well settled that the agreement between the creditor and principal debtor which will discharge the surety must be a valid and binding agreement, and one which presents a legal ob-

stacle for the time to the prosecution of an action upon the original security: *Howell v. Sevier*, 1 Lea, 360, 27 Am. Rep. 771; *Wilson v. Langford*, 5 Humph. 320. But where the principal in a note after maturity contracts with his creditor for delay without the knowledge of the sureties by paying part of the indebtedness as a credit, the contract is without consideration and will not bind the creditor or discharge the sureties. The promise by the party of payment is only part performance of his previous existent obligation. He does nothing more than he was already bound to do, and the party receiving the money or promise receives nothing in addition to what he was already entitled to receive under his contract. Such an agreement would interpose no obstacle in law to the enforcement of the original contract: *White v. Summers*, 1 Baxt. 154; *Olmstead v. Latimer*, 158 N. Y. 315, 53 N. E. 5. A partial payment, however, made on a note before its maturity, is a good consideration for an agreement to extend the time for payment of the balance, and consequently discharges the surety: 24 Am. & Eng. Ency. of Law, 829, citing authorities. See, also, *Bank v. Shook*, 100 Tenn. 436, 45 S. W. 338. But in *McKamey v. McNabb*, 97 Tenn. 114 237, 36 S. W. 1091, it was said that payment of a portion of a debt before the expiration of the three days of grace did not amount to a valid consideration to support an agreement for delay. It was held this defense was too technical and without any real merit.

The court of chancery appeals, after an elaborate citation and discussion of the testimony, find as a fact that both parties had in mind the payment of the note at maturity, and not before maturity. The possibility of the money being paid at the bank and applied before maturity (the day before) was not considered by either party. Here was, in substance, an understanding, as we infer from the facts, that at maturity a certain sum would be paid upon the debt, and the balance extended for ninety days. As a matter of fact, this sum was paid to an agent of the holder of the note at a distant place one day before maturity. That court found that, while the bank in which the notes were deposited for collection had the right to receive and apply the money, it was not authorized to make any contract that would release the sureties, and that it would be a harsh application of the rule to say that a contract for delay under such circumstances amounted to an agreement for delay upon a binding consideration.

We concur with that court in holding that a payment made by the bank the day before the maturity of the note, when the contract of the ¹¹⁵ holder and principal was that the payment should be made at maturity, would not release the sureties.

The next assignment of error is that the court of chancery appeals should have held the note in suit barred by the statute of limitations. A more specific statement of this assignment of error is, viz.:

"This suit was brought August 3, 1898. The note was due and payable March 20, 1891. More than six years had, therefore, elapsed from the time the right of action had accrued on the note to the time suit was brought, and the Tennessee statute had completed the bar. This defense was made by answer and plea. Complainant introduced proof to the effect that defendant, Childress, was absent from the state of Tennessee a part of the time, and that for this reason the statute did not apply. Defendant, however, insists that absence from the state is not alleged in the bill, and there being no issue on this question, the proof is irrelevant. The bill is remarkable for its brevity. It alleges that complainant, as indorsee, sues the defendants as the makers of the note, Exhibit 'A' to the bill. Said note, after demand, is unpaid, except to extent shown by credits indorsed. Said note, while apparently barred by the statute of limitations, is not, in fact, barred, but in full force."

It will be observed that there is no allegation ¹¹⁶ of fact in the bill to bring the suit within any saving clause of the statute of limitations, but the pleader contents himself with a statement of a conclusion of law—namely, that the note is in full force. We are constrained to hold this pleading insufficient to have authorized the introduction of proof by complainant that defendant, Childress, was in fact absent from the state about one-third of the time the statute was running. The court of chancery appeals, in taking a contrary view, were governed by the case of *Criner v. Cherry*, 3 Shannon's Tenn. Cas. 496. The bill in that case was filed by the creditors of Robert Long, deceased, against his administrators and heirs at law, in the chancery court of McNairy county. It was alleged that insolvency of the estate had been suggested by the administrator at the March term, 1867, of the county court; that the personal assets had been exhausted in the payment of debts, and that intestate owned certain lands which it was sought to subject to the payment of debts. The answer contested the claims of complainant on the ground that they were

barred by the statute of limitations of two and a half and six years.

The point relied on by complainant in proof to save the bar of the statute was the fact that the court of McNairy county had been closed for four years during the war. The court, in a petition to rehear, used this language: "The saving ¹¹⁷ of the bar of the statute might have been established by any evidence sufficient for the purpose, whether denied or not by the answer. The bill charges the existing indebtedness; the answer denies it, and relies on the statute of limitations. The years of the statute had passed, but defendants or complainants might by evidence show any fact or law which would tend to support his claim, and complainant may show his claim not barred, whether it be that the statute was suspended by the closing of the courts or by having filed his claim in court, or suit brought therein in due time."

The case of *Criner v. Cherry* was decided in 1875, and, so far as we are advised, it was reported for the first time in *Shannon's Tennessee Cases*, 496, published in 1899, and has not been cited in any subsequent case on the point now in issue. It is not supported by any authority, and is wholly irreconcilable with recent decisions of this court.

This exact question arose in *Pratt v. Vattier*, 9 Pet. 405. Mr. Justice Story, who delivered the opinion of the court, said, viz.: "In regard to the statute of limitations, it is clear that the full time has elapsed to give effect to that bar upon the known analogy adopted by courts of equity in regard to trusts of real estate, unless Bartle is within one of the exceptions of the statute by his nonresidence and absence from the state. It is said there is complete proof in the ¹¹⁸ cause to establish such nonresidence and absence. But the difficulty is, the nonresidence and absence are not charged in the bill, and, of course, are not denied or put in issue by the answer, and unless they are so put in issue the court can take no notice of the proofs; for the proofs, to be admissible, must be founded upon some allegations in the bill and answer. . . . And the doctrine is now clearly established that, if the statute of limitations is relied on as a bar, the plaintiff, if he would avoid it by any exception in the statute, must explicitly allege it in his bill or specially reply it, or, what is the modern practice, amend his bill": See, also, *Gibson's Suits in Chancery*, 336; *Hick's Manual of Chancery Practice*, 142.

This rule of pleading was recognized and applied in the case of *Cross v. Disney*, 95 Tenn. 595, 32 S. W. 632. The court said: "In the first place, the averment of the bill by which it was complainant's evident purpose to avoid the anticipated plea of the bar of the statute, by setting up a disability which would entitle her to its saving clause, falls far short of the requirement of correct pleading. It will be seen that complainant fails to state that she was a feme covert at the time the adverse holding of the defendant began, and that this condition of coverture continued until this suit began, or to a point of time within the saving of the statute. We think it may be taken ¹¹⁹ as a well-established rule of practice that when the statute of limitations is relied on at law or in equity, and the plaintiff desires to bring himself within its saving, it is proper for him to set forth the facts specially. . . . And the party thus seeking to avoid the effect of the statute by disability must not only aver that it existed when the cause of action accrued, but he must allege in his pleadings a continuance of it to a point of time when it would be a perfect answer to the bar."

So, in the case of *Whaley v. Catlett*, 103 Tenn. 348, 53 S. W. 131, it is held that where the plaintiff seeks to avoid the effect of the statute of limitations on the ground of concealment of defendant, the fraudulent action must be properly alleged. The court said, viz.: "The statement in the declaration is that defendant fraudulently concealed from the plaintiff and the public the wrongful, willful, and malicious act. If this bill be held sufficient to charge the concealment of the cause of action, and not merely the evidence of the defendant's connection therewith, still it is fatally defective, in that it does not show that the cause of action was discovered within one year next before the action was brought. The declaration clearly implies that it has been discovered, but does not disclose when. In order to take the case out of the statute, it must be alleged and shown that ¹²⁰ the cause of action was concealed to a time within one year next before the suit was brought, and discovered within the year."

These cases announce the correct rule of pleading, and must govern the determination of the present case.

The case of *Criner v. Cherry*, 3 Shannon's Tenn. Cas. 496, to the extent it holds that a suspension of the statute of limitations may be shown by proof, without direct issue made by the pleadings, is not authority, and is overruled.

It follows that the decree of the court of chancery appeal, as well as that of the chancellor, in favor of the complainant, adjudging liability against the defendant on the note in suit, are both erroneous, and the same are reversed. But inasmuch as complainant had a right to rely on the authority of *Criner v. Cherry*, 3 Shannon's Tenn. Cas. 496, in formulating his pleadings, and has been misled thereby to his prejudice, the court is of opinion this is a proper case for remandment for an amendment of the bill. It is accordingly so ordered, but complainant will pay all costs of this court and of the court below.

SURETYSHIP.—AN EXTENSION OF TIME in which to pay a promissory note, void for want of consideration, does not release the surety thereon: *Davis v. Stout*, 126 Ind. 12, 22 Am. St. Rep. 565, 25 N. E. 862. See, also, *McDougall v. Walling*, 15 Wash. 78, 55 Am. St. Rep. 871, 45 Pac. 668.

THE STATUTE OF LIMITATIONS MUST BE PLEADED in order to be available: *Gilbert v. Hewetson*, 79 Minn. 826, 79 Am. St. Rep. 486, 82 N. W. 655. So must exceptions in the statute: *Union Bank v. Planters' Bank*, 9 Gill & J. 439, 31 Am. Dec. 113. See, too, *Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740.

WALLER v. MARTIN.

[106 Tenn. 341, 61 S. W. 73.]

ESTATES BY CURTESY—LIFE ESTATES.—A surviving husband does not take an estate as tenant by the curtesy in lands held by his wife only as a tenant for life.

WILLS—DEVISE CREATING LIFE ESTATE.—A devise of lands to the testator's daughter, "to have and to hold during her natural life, and at her death to go to her legal heirs," creates only a life estate in the daughter, with remainder to her children or their descendants. In such devise, the words "legal heirs" are equivalent to the words "children or their descendants."

WILLS—DEVISE FOR LIFE—POWER OF DISPOSITION. If land is devised to a person for life, with remainder to her children, absolute power of disposition is not conferred upon the devisee by a subsequent provision in the will giving her power to sell the lands, but requiring her to reinvest the proceeds in other lands, taking a deed therefor to herself for life with remainder to her children, and appointing a trustee to see that this part of the will is strictly complied with.

McClain & McClain, for the appellant.

Cantrell & McMillan, for the appellee.

342 **WILKES, J.** The question in this case is to determine the rights of R. J. Omohundro to a homestead in certain real

estate in controversy. The contest arises between the heirs at law of his wife, Mary E. Omohundro, and a creditor of the husband who had levied upon the interest of the husband in the land and sold it upon the theory that he had a life estate in it as tenant by the curtesy.

The present proceeding is by the heirs of Mrs. Omohundro to enjoin further proceedings to set apart such homestead, upon the theory that upon the death of Mrs. Omohundro the property descended to them, and that Mrs. Omohundro had but a life estate in the premises, and her surviving ³⁴³ husband could not have, therefore, any estate as tenant by the curtesy in them.

The chancellor held that the husband had no estate by curtesy in the land, and the court of chancery appeals affirmed this holding and enjoined the proceedings to set aside homestead, vacated the sale, and declared and adjudged the children of Mrs. Omohundro to be the owners of the land in fee simple, and removed the clouds created by the condemnation and sale proceedings from the title. The creditor has appealed to this court.

If Mrs. Omohundro had only a life estate in the land, with remainder to her children, her entire interest in the land would cease with her death, and there would be nothing in which the husband could have an estate by curtesy: *Beecher v. Hicks*, 7 Lea, 207, 214; *Alexander v. Miller*, 7 Heisk. 81; 2 Kent's Commentaries, 134; *Bigley v. Watson*, 98 Tenn. 353, 358, 39 S. W. 525; *Stovall v. Austin*, 16 Lea, 700, 706.

The title of Mrs. Omohundro was derived under the will of her father, which contained this clause: "I give and bequeath to my daughter, Mary E. Omohundro, my farm near the grade in the twenty-third civil district of Wilson county, Tennessee [describing it], to have and to hold during her natural life, and at her death to go to her legal heirs. Now, I intend, and hereby will and direct, that all the lands I give to my ³⁴⁴ daughters shall be under her control and free from the debts of her husband, but should any of them at any time desire to sell their lands, they may do so provided they reinvest the proceeds in other lands, taking a deed to her and her legal heirs with the same provisions contained in this will, and I hereby appoint my son, Joshua C. Logue, trustee, to see that this part of my will is strictly complied with."

It is insisted that such a power of disposition is given to Mrs. Omohundro by this will as must vest in her an absolute estate

in the land. We think this position is not well taken, since the power of disposition is restricted to a sale for reinvestment on precisely the same terms under which the original property is held. It is not an unlimited power of disposition, and the case is not brought within the rule laid down in *Bradley v. Carnes*, 94 Tenn. 27, 45 Am. St. Rep. 696, 27 S. W. 1007. A general discussion of the subject of limited and unlimited estates in the first taker is there had, and need not be here repeated.

The case of *Young v. Insurance Co.*, 101 Tenn. 311, 314, 47 S. W. 428, was where there was a devise to a mother for life with power to sell for reinvestment, and it was held that the power did not convert the estate into a fee nor cut off the remainder interest.

So in the present case there is no power in the life tenant to defeat the remainder, for a ³⁴⁵ sale could only be made for reinvestment, and a trustee is appointed to see that this shall be done in a particular mode.

It is said, however, that the terms used in the will vest a fee simple estate in Mrs. Omohundro. In other words, that the phrase "to go to her legal heirs," means that the property shall descend to the persons who, under the law, will answer the description of heirs, and if her "children" are the "heirs," they will take under the laws of descent, and not as purchasers under the will, and, this being so, under our statute the estate vesting in a party and her heirs would at once be converted into an estate in fee simple in the first taker. In this connection the rule is invoked that where a party would take by descent the same estate that a devise purports to give him, then the law presumes that he takes by descent and not by devise: 4 Kent's Commentaries, sec. 506.

Unquestionably, in the absence of any statutory provision, if an ancestor devise to his heir just the estate in quality and quantity which he would take by descent, the latter will be considered as holding by descent and not by devise: 3 Washburn on Real Property, side pp. 414, 699.

But Mrs. Omohundro did not take under her father's will the quantity and quality of estate she would have taken by descent, but she took a life estate only. Under the statutes of descent ³⁴⁶ her children would have taken nothing from the grandfather, but under the will they take an estate in remainder.

In the connection in which it is used in this will the expression "legal heirs" is equivalent to children or their descendants. The term "legal heirs" is frequently held from its connection to mean children: See the question discussed in *Alexander v. Wallace*, 8 Lea, 572; *Ingram v. Smith*, 1 Head, 426; *Gosling v. Caldwell*, 1 Lea, 454, 27 Am. Rep. 774; *Boyd v. Robinson*, 93 Tenn. 34, 23 S. W. 72, and a large number of cases there cited.

We are of opinion, therefore, that Mrs. Omohundro took only an estate for life in the lands in controversy, and her children took the remainder interest as purchasers, and not by descent, and the surviving husband had no estate by curtesy in the lands.

The decree of the court of chancery appeals is therefore affirmed.

TENANCY BY THE CURTESY does not exist unless there has been marriage, seisin, issue born alive, and death of the wife: *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433.

LIFE ESTATE.—A DEVISE of property to a testator's son, and after his decease to belong to his heirs, gives him an estate for life only: *Defreese v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584, 67 N. W. 505.

LIFE ESTATE.—A POWER OF SALE or of disposition added to a life estate does not raise it to a fee: *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558; *Mansfield v. Shelton*, 67 Conn. 390, 52 Am. St. Rep. 285, 35 Atl. 271; *Skinner v. McDowell*, 169 Ill. 365, 61 Am. St. Rep. 183, 48 N. E. 810.

INSURANCE COMPANY v. FOX.

[106 Tenn. 347, 61 S. W. 62.]

INSURANCE, LIFE—INCONTESTABILITY.—If a life insurance policy provides that it is "issued and accepted subject to the benefits, provisions, and conditions on the second page hereof," made a part of the contract, and that "except as hereinbefore provided this policy shall be incontestable for any cause except misstatement of age," the policy cannot be contested on the ground of fraud in the application and medical examination preceding the issuance of the policy, such application and examination not being indorsed on the second page of the policy.

INSURANCE, LIFE—INCONTESTABILITY—FRAUD.—A condition in a life insurance policy that it shall be incontestable for fraud in the application therefor, or in the medical examination preceding it, is not void as against public policy.

INSURANCE, LIFE—SUICIDE—STARVATION.—If a policy of life insurance provides that it shall be void "if the insured

should die by self-destruction, whether sane or insane," his beneficiary cannot recover if it is shown that voluntary starvation caused or hastened the insured's death, although he was at the time fatally ill with scurvy, which would have ultimately caused his death.

Palmer & Ridley, for the appellant.

J. E. Richardson, for the appellee.

318 WILKES, J. This is an action upon a life insurance policy. It is brought by Mrs. Susie E. Fox, the widow of the assured and the beneficiary named in the policy. It was issued September 10, 1898, and the insured died December 12, 1898, or about three months after the issuance of the policy. The cause was tried before a jury in the court below, and there was judgment for two thousand and seventy-eight dollars and thirty-five cents, the amount of the policy, and the company has appealed and has assigned errors.

Passing over the details of the pleadings, the principal question presented to this court is whether, under the terms and stipulations of the policy, fraud perpetrated by the insured in procuring the policy is available as a defense to a recovery upon it. Upon this feature the court charged the jury as follows: "It [the company] further files several pleas alleging fraud in procuring the policy, and alleging that the assured, John E. Fox, falsely answered questions propounded to him in his application for insurance, to wit, as to the sanity or insanity of his father, himself, and his sister, and as to his previous illness, as set out in its pleas. You are instructed that if you find the policy introduced in **349** evidence to be the contract of insurance, then the defendant would be estopped from relying upon such defenses, and would be held to have waived them."

It is insisted this instruction was erroneous, and it presents the question now to be considered. In the face of the policy the following provisions appear, to wit: "On consideration of the statements made in the application for this policy, which application is hereby made a part of this contract," etc.

Again: "This policy is issued and accepted subject to the benefits, provisions, and conditions on the second page hereof, which are made a part of this contract."

Turning to the application we find the following provisions, which are pertinent and proper to be considered:

1. "It is hereby agreed and warranted that should the company issue a policy upon this application its interest shall not

be affected by verbal statements made to its agents or others, or by the knowledge of such agent, but it shall be affected only by the statements herein made, including those made to the medical examiner, which are hereby warranted to be full and correct as facts, and they shall constitute the basis of any policy which may be issued hereon."

2. In the statement to the medical examiner it is said: "I hereby further declare that I have ³⁵⁰ read and understand all the above questions put to me by the medical examiner, and the answers thereto, and that the same are true, and that I am the same person described as above, and I hereby warrant that there is not, and there has not been, any concealment of facts regarding my past and present state of health and habits of life or my personal history."

The conditions referred to as being on the second page of the policy are as follows:

"1. The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes, given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy, without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy are hereby made a part of this contract of insurance.

"2. No suit to recover under this policy shall be brought after one year from the death of the insured.

"3. If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured ³⁵¹ should die by self-destruction, whether sane or insane, within three years from the date hereof, this policy shall be null and void, and in case of said avoidance the reserve value only, according to the actuaries' table of mortality, with four per cent interest, shall be paid on the surrender of this policy. Except as hereinbefore provided, this policy shall be incontestable for any cause except misstatement of age. In case the age of insured shall have been misstated, the amount payable hereunder shall be such proportion of the sum insured as the premium paid bears to the required premium at the correct age of the insured."

The real controversy arises out of the true meaning and proper construction of the phrase, "except as hereinbefore provided." It is said by the company that the phrase applies to and embraces everything contained in the face and on the back of the policy coming before this excepting clause; in other words, it embraces not only the conditions set forth on the second page, but also the warranties and representations made in the application and on the face of the policy on its first page. The different results reached by these different constructions are apparent at a glance. If the phrase is limited to the conditions set out on the second page, then the policy is contestable only for a breach of those conditions, while under the other construction it would ³⁵² be contestable for any fraudulent misstatement by assured in the application and medical examination.

It is further stated that if the clause should be so construed as to make the policy incontestable for fraud in obtaining it, then the contract itself would be void, because contrary to public morals and a sound public policy.

The question involved in this controversy was before the supreme court of Iowa in the case of *Welch v. Union Cent. Life Ins. Co.*, 108 Iowa, 224, 78 N. W. 853. In that case the policy involved was the same as in the present case, issued by the same company. That court held that the phrase, "except as hereinbefore provided," applied not only to the conditions indorsed on the second page of the policy, but also the application and the statements contained in it, and that to hold the policy incontestable for fraud would be to deny any effect to the warranty and agreement of the applicant, while to hold otherwise gives full effect to all parts of the contract.

That court says, if the policy may never be contested for fraud in its procurement, why include the warranty and agreement in it? That court also intimates that a provision in a policy that it should not be contestable for fraud would be void, and render the contract itself invalid.

The court also draws a distinction between ³⁵³ policies which are by their terms to become at once incontestable and those to become incontestable only after a certain length of time, and intimates that the latter cases may be sustained, and that fraud will not defeat such policies after the time limited, because the company has reserved to itself the delay which it deems necessary to detect and discover the fraud, and, if it has not been discovered and defended against in that time,

It may not be afterward set up. In this latter class falls the case of *Clements v. Insurance Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650, 46 S. W. 561. See the same case reported in 42 L. R. Ann. 247. It is conceded that this case is correctly decided, but it is said that the present case, as well as the case from Iowa, is to be distinguished from it by the fact that in the *Clements* case a period of one year was reserved by the company in which it might make such investigations as it deemed proper, and, if dissatisfied, might cancel the policy, while here no time is reserved. It will be noted that this is a confession that fraud will not prove a defense after the expiration of one year; so that this concession, as well as the holding in the *Clements* case, goes to the extent that fraud in procuring the policy does not render it void, but only voidable within the time stipulated. If the time may be limited to one year within which the defense of ³⁵⁴ fraud may be made available, it is difficult to see why it may not be limited to six months or one month, or such other time less than this as the company may deem it important to stipulate.

If fraud may be waived at all, certainly the parties may stipulate the grounds upon which the waiver may be made, and if a company can stipulate that its policies shall be incontestable, it may fix the conditions upon which incontestability shall rest, and may fix a time limit upon the right to contest.

We think that a consideration of the manner in which insurance is effected and policies are written will remove much of the difficulty in determining the proper decision of this case. When a party applies for a policy, he is required to make an application, and in it to reveal and state everything that the company deems material to the risk. A large number of questions are put to him to elicit the facts. These questions are framed by the company, and he is obligated by the terms of his application to commit no fraud and make no material mistake in answering them. Not only so, but the company by its own medical examiner, subjects the applicant to a physical, personal examination, and to a course of questions calculated to bring out and make plain his physical history and condition.

With this statement of the applicant and report of its own examiner before it, the company ³⁵⁵ has the privilege of making such investigation as it may deem proper. It is under no obligation to come to a conclusion in any definite or specified

time. If it desires a week, it may take it; if a month or a year, it may suspend its acceptance until that time expires.

We can see no difference in principle between the present case and the Clements case. In that case, the company stipulated for twelve months' time after it issued its policy; in the present case, it took the time it deemed necessary before accepting the policy. It may, therefore, well be held to have waived the effects of fraud, since it had such time to discover it as it saw proper. We can, therefore, see no good reason why these parties may not have entered into such contract if they saw proper so to do: Joyce on Insurance, sec. 3732.

We are not passing upon the wisdom of such a provision, but upon the rights and liabilities of the parties if it has been made. But the question remains, Did the company intend to cut itself off from the defense of fraud in obtaining the policy?

In the Clements case the incontestable clause read as follows: "After the policy shall have been in force one full year, if it shall become a claim by death, the company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed." ³⁵⁶ This is a broad provision, and leaves the policy contestable alone upon the ground of nonpayment of premiums.

Now, in the present case, it is evident that the company intended to stipulate that it would not contest the policy upon any ground except misstatement of age, and "except as hereinbefore provided." We cannot construe this exception as leaving the company an option to contest the policy for any matter contained in the application and medical examination, but only for such matters as are stated in the conditions indorsed upon it. These conditions are, in brief: 1. Failure to pay premiums as agreed upon; 2. Bringing suit within one year after the death of the insured; 3. The entrance by insured into military or naval service, engaging in saloon business, death by self-destruction within three years; 4. Misstatement of age.

To hold that all the statements made in the application are to be excluded from the clause of incontestability would be to deny any scope or effect to that clause.

These statements of the application and examination contain all the grounds of contest of which the policy is susceptible so far as its terms are concerned. If they are all excepted, no contest may be made upon any or all of them, then the non-contestable clause has no operation ³⁵⁷ whatever. Of course

the clause does not embrace a matter which is outside of the terms and conditions of the policy, such as nondelivery, forgery, false impersonation, etc., as these matters would go to the question of title, and not mere fraudulent or false misstatement in the policy itself.

The true meaning is, that no defense will be interposed by reason of the terms and form of the policy except those embraced under the head of conditions, including the express provision as to misstatement of age. To illustrate, the company might defend under the policy on the ground that plaintiff was not dead; that the policy had never been delivered; because such defenses do not amount to the contest of the terms, provisions, conditions, and stipulations of the policy.

We are of opinion that the causes set out in the "conditions" and the misstatement as to age are the only grounds upon which the company, under the terms of this policy, has the right to contest liability, and it has waived the right to make any contest on any other ground covered by the terms and provisions of the policy.

We can come to no other conclusion and give any effect to this clause in reference to noncontestability, nor to give effect to the different provisions of the policy.

It is assigned as error that the court refused to charge, upon defendant's request, that "if John ³⁵⁸ Fox was desperately ill from scurvy, and became weary of life and deliberately undertook to starve himself to death, and the scurvy and starvation jointly caused his death, there can be no recovery in this case."

The defendant had already made two requests bearing upon this feature of the case, both of which were given, and are as follows:

"If John Fox refused to take nourishment, and the proximate cause of his death was starvation, and he refused to take nourishment in order to bring about that result, there can be no recovery by plaintiff in this case. That would be so although John Fox may have been so sick from scurvy that it would ultimately have caused his death. If John Fox was fatally ill with scurvy, and his death was hastened by such starvation, there can be no recovery by plaintiff."

Again: "If John Fox was desperately ill with scurvy, and became weary of life, and deliberately starved himself to death, there can be no recovery by plaintiff in this case. If the lack of nourishment was the proximate cause of his death, this

would be so even though he was so afflicted with scurvy that it would have ultimately resulted in his death."

This, we think, is ample on this feature of the case, and embraces the request refused.

We can see no error in the proceedings and judgment of the court below, and it is affirmed with costs.

LIFE INSURANCE—INCONTESTABLE CLAUSE.—Where a policy of life insurance provides that after one year from its inception it shall be incontestable if the premiums are paid, it cannot be contested by the insurer, after a year has elapsed, on the ground of fraud in obtaining the policy: *Clement v. Insurance Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650, 46 S. W. 561. See, also, *Patterson v. Natural etc. Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899, 75 N. W. 980.

LIFE INSURANCE—SUICIDES.—It has been held that an insurance company is liable under an incontestable clause when the insured commits suicide, though the application stipulates that the insurer shall not assume liability for the death of the insured by his own hand: *Goodwin v. Provident etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411, 68 N. W. 157.

INSURANCE COMPANIES v. ESTES.

[106 Tenn. 472, 62 S. W. 149.]

INSURANCE—EFFECT OF UNDISCLOSED VENDOR'S LIEN.—The existence of an undisclosed vendor's lien upon insured property, and the commencement of proceedings, with the knowledge of the insured, to enforce it, does not avoid a policy of insurance containing a provision that "this entire policy shall be void if the interest of the insured be other than unconditional or sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if, with the knowledge of the insured, foreclosure proceedings be commenced with notice given of sale of any property covered by the policy by virtue of any mortgage or trust deed."

TRIAL.—INSTRUCTIONS upon an issue in the case, which, though not supported by direct and positive evidence, is supported by circumstances sufficient to sustain the verdict, are not erroneous.

EVIDENCE—REVENUE STAMPS—UNSTAMPED INSTRUMENTS.—The fact that a deed or other instrument has no internal revenue stamp upon it, or that it has not the amount of such stamps upon it required by the United States statute, does not render it inadmissible nor affect its force as evidence in the state courts.

EVIDENCE—REVENUE STAMPS.—Congress has no power to provide for the exclusion of instruments as evidence in state courts for want of internal revenue stamps required by United States statute to be affixed thereto.

J. J. Vertrees and J. A. Cartwright, for the Insurance Companies, appellants.

H. A. Luck, Rutherford & Rutherford, and R. O. Allen, for Hunter and Estes, also appellants.

⁴⁷³ McALLISTER, J. These actions were commenced separately to recover on policies of fire insurance. The same questions being involved in both suits, they were consolidated in the court below and heard together. The trial resulted in a verdict and judgment against each company for the sum of one thousand dollars, the amount of its policy, with interest. Both companies appealed and have assigned errors.

The declarations allege that on the 13th of February, 1899, the defendant companies issued to the plaintiff, E. M. Estes, policies of fire insurance for the sum of one thousand dollars each on a certain ⁴⁷⁴ mill building, machinery, etc., known as Brentwood Mills, situated in Williamson county, Tennessee. The policies contained a clause, "loss, if any, payable to W. A. Hunter, Jr., as his interest may appear."

On the 1st of April, 1899, said building, machinery, etc., were totally destroyed by fire, without the fault of the plaintiff. Defendant companies were notified of the loss, and, within the time prescribed by the policies, the plaintiff filed with defendants proofs of loss, and defendants, although often requested to pay said loss, have wholly failed and refused to do so.

Defendants pleaded the general issue, and also following special pleas, to wit:

"1. That at the time the insurance was applied for and obtained the plaintiff stated and represented to the defendants that he owned the entire interest in the property insured, and the policy itself contains such representation, but as a matter of fact the plaintiff was the owner only of an undivided interest in the property, and not the whole thereof, which undivided interest was encumbered by a vendor's lien in favor of one W. A. Hunter for twelve hundred and sixty dollars and eighty cents, which is unpaid, and also by a trust mortgage in favor of one J. E. Vandergrift for one hundred dollars, unpaid, whereof the defendants then had no knowledge."

It is further averred that the contract of insurance contains the following clause, to wit:

475 "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional or sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if, with knowledge of the insured, foreclosure proceedings be commenced with notice given of sale of any property covered by the policy by virtue of any mortgage or trust deed."

Defendants further aver that "at the time of the issuance of the policy sued on, or about the 12th of January, 1899, the property insured was encumbered by a vendor's lien in favor of one W. A. Hunter, and of which the defendant had no knowledge, and that on the first day of March, 1899, the said Hunter exhibited his bill in the chancery court of Franklin, Williamson county, Tennessee, to enforce or foreclose said lien against the property for the payment of twelve hundred and sixty dollars and eighty cents due and secured by said lien as aforesaid. Defendants aver that plaintiff had notice or knowledge of said foreclosure proceedings before the destruction of the property insured, but that defendant had no notice thereof, wherefore defendants say said policy is utterly void."

Plaintiff demurred to this last or third plea, the demurrer was sustained, and this action of the court is assigned as the first error.

It will be observed that the foreclosure proceedings 476 mentioned in the policies relate to mortgages or deeds of trust. But it is insisted on behalf of the company that the clause of the policy in question applies with equal force to proceedings to enforce a vendor's lien, and that there can be no difference in principle, under the clause quoted, between the foreclosure of a vendor's lien and the foreclosure of a mortgage or deed of trust.

In *Delahay v. Memphis Ins. Co.*, 8 Humph. 684, it was held that a failure on the part of assured to disclose the existence of a mortgage on the property is not a circumstance material to the risk, and will not avoid the policy. The reason given for the ruling is that a mortgage or deed of trust is only a security for the debt, and if the property be destroyed the debt remains, so that the assured has as much interest in protecting the property as if there were no encumbrance on it.

In the case of *Manhattan Ins. Co. v. Barker*, 7 Heisk. 504, it was a condition of the policy that it should be void if the interest of the insured in the property be any other than the en-

ire, unconditional, and sole ownership of the property for the use and benefit of the insured, and this be not represented to the company. It appeared in that case there was an undisclosed vendor's lien on the goods sold, but the court held that fact did not avoid the insurance.

⁴⁷⁷ It was held that the equitable owner of property is "the entire and sole owner" within the meaning of the policy. The reasoning of the court was that if the existence of a lien by a regular mortgage undisclosed does not vitiate a policy, then one based merely on the retention of title by the vendor would have no more effect.

So in *Insurance Co. v. Crockett*, 7 Lea, 725, the policy provided, as in this case, that "if the interest of the insured in the property be any other than the entire, unconditional, and sole ownership for the use of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." It appeared that the assured only had a title bond to the premises. Held, the policy was not avoided, inasmuch as the failure to disclose the fact that the property was encumbered was not material to the risk. The same principles were reaffirmed by this court in *Light v. Insurance Co.*, 105 Tenn. 480, 58 S. W. 851.

If, then, the existence of an undisclosed mortgage, deed of trust, or vendor's lien on the property insured will not invalidate the insurance, we cannot perceive how, on principle, notice of foreclosure of the mortgage or vendor's lien could have that effect, notwithstanding such a stipulation in the policy. Foreclosure proceedings are, of ⁴⁷⁸ course, the remedy of the mortgagee for nonpayment of his debt on maturity of the mortgage, or when the same is overdue. The remedy is an incident of the mortgage, and while the ownership of the property may thus be changed during the currency of the insurance, it is a result that is brought about by the existence of the mortgage. The fact of the existence of the mortgage, as we have already seen, does not vitiate the insurance.

The next assignment is, that the court erred in charging the jury on the subject of the equitable ownership of the property.

The facts necessary to be stated in this connection are that W. A. Hunter, Jr., originally owned said mill, and sold it by deed to Dobson & Roser, retaining a vendor's lien to secure unpaid purchase money. On August 31, 1898, Dobson and wife, by deed, conveyed to the plaintiff, E. M. Estes, a one-third in-

terest in said property, Estes assuming the payment of one-third the purchase money due Hunter. On October 18, 1898, Dobson and wife sold their remaining one-third interest in said mill to the plaintiff, E. M. Estes, the latter assuming another third of Dobson's indebtedness to Hunter. It is not disputed that these two deeds were executed and delivered to Estes, and the purchase money paid by him. It further appears that on December 30, 1898, Dobson and wife and Roser and wife joined in ⁴⁷⁹ a deed conveying to Estes the remaining one-third interest in the mill property, Estes assuming payment of balance of purchase money due Hunter. This last deed recites that two hundred dollars was paid in cash, and notes executed for the balance, and that the other two-thirds of said tract had been "by us heretofore sold to said Estes by deed which is hereby ratified and affirmed." It is further recited that it was the intention of the grantors to transfer the whole of said tract known as the "Brentwood Mills Tract." Roser and wife signed and acknowledged this last deed, and left it at Esquire Rose's office, where Dobson later signed and acknowledged same. It is insisted on behalf of defendants that this last deed was never in fact delivered by the grantors to Estes, the plaintiff, and hence the latter was not the sole owner of the property at the time the insurance was effected and when the loss occurred. Estes died before the trial, and in the absence of his testimony there was some confusion about the delivery of the last deed.

Estes swears in his proofs of loss that he was the owner of the entire property. Dobson testifies that the entire purchase money due him had been paid, and that Roser told him that he had sold his entire interest to Estes. Roser and wife, it appears, have removed from the state, and their evidence was not heard. Roser and wife ⁴⁸⁰ have never filed with the administrator of Estes any claim for unpaid purchase money.

It appears that Estes applied for and obtained the insurance January 12, 1899. At that time it was conceded that he owned a two-thirds undivided interest in the mill property, and that he had contracted for the remaining one-third interest, but it is denied that the deed to this remaining one-third interest has ever been delivered to him. It is also shown by the proof that at the time Estes took out the insurance he told Hart, the agent, that he owned two-thirds of the mill property, and had contracted for the remaining one-third interest. Now, upon these facts in proof, it is assigned as error that the court charged the jury as follows, namely:

"If you find from the proof that E. M. Estes had previously purchased and obtained deeds to two-thirds of the property insured; that subsequently he contracted verbally for the purchase of the remaining third; that pursuant to such verbal agreement Estes paid in cash the sum of two hundred dollars, with the understanding that the vendors would execute a deed and deposit the same with an attorney, to be by him delivered to Estes as soon as the balance of the purchase money was paid in full; if you further find that said balance was paid, and the deed subsequently delivered as agreed, then, in such case, Estes would be the equitable owner of an insurable interest in the ⁴⁸¹ property under the terms of the two policies, and your verdict should be for the plaintiff in both cases."

It is not insisted that this charge is erroneous as an abstract proposition, but the claim is that there was no evidence whatever that the deed was to be retained to be delivered upon the payment of the notes. It is insisted, further, that there was no evidence that the notes were paid, or that the deed was ever delivered. It is true there is no direct and positive testimony that the notes were paid, or that the deed was ever delivered, but we think, from the facts and circumstances already recited, the jury were well warranted in believing that the notes had all been paid, and that the deed had been executed and delivered to Parham for the vendee, Estes.

The next assignment is the court erred in admitting as evidence the three deeds to Estes dated, respectively, October 18, 1898, August 20, 1898, and December 30, 1898, for the reason they were not stamped. The war revenue act, enacted by Congress in 1898, provided that certain instruments, including deeds, should be stamped. Section 13 provides "that if a document required to be stamped is either issued or recorded without being duly stamped, with intent to evade the law, the person offending shall be guilty of a misdemeanor," and it further provides that such ⁴⁸² instrument, document, or paper not being stamped according to law, shall be deemed invalid and of no effect.

Section 14 provides "that hereafter no instrument, document, or paper required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted or used as evidence in any court until a legal stamp, or stamp denoting the amount of tax, shall have been affixed thereto as prescribed by law."

This question first arose in this state in 1867, in the case of *Miller v. Morrow*, 3 Cold. 587, under the internal revenue acts of 1862, 1864, 1865, 1866. In that case, Judge Shackelford delivering the opinion, the court held that the act of Congress which forbade the recording and using in evidence any instrument, document, or paper required by law to be stamped, unless a stamp of the proper amount shall have been affixed, was applicable alike to the proceedings in state and federal courts, and hence that a deed registered without being so stamped was invalid as evidence and as a muniment of title.

A petition to rehear was granted, and the cause was thereafter continued from term to term. In the meantime the case of *Sporrer v. Eifler*, 1 Heisk. 638, was decided, in which the court reached a directly contrary conclusion. Judge Turney, ⁴⁸³ in delivering the opinion in the case, said: "There has been no delegation by the states to Congress of power or authority to legislate for the internal regulation of the states, nor are the people of the state prohibited by the constitutions from creating and regulating the courts of the states, and declaring the rules for their government. The legislature of the state is the only power that can enlarge or contract the rules of evidence or create and enforce new rules in the courts of the states. If Congress may by its enactments make a change of the rules of evidence as applicable to the courts of the states in any one particular, it may in all things. It follows," said the court, "that stamps are not necessary to the validity of the paper as a muniment of title, nor to its competency as evidence in the courts of the state." This case had been decided when *Miller v. Morrow* was finally heard, and the court reversed the former ruling and adhered to the opposite view of the law as announced in *Sporrer v. Eifler*, 1 Heisk. 638. The case of *Miller v. Morrow* on the second hearing is reported in 5 Heisk. 689. These rulings were afterward followed in *Walt v. Walsh*, 10 Heisk. 321, and in *Bangess v. Partee*, 2 Shannon's Tenn. Cas. 269.

An able argument has been submitted attacking the soundness of the views expressed in *Sporrer v. Eifler*, 1 Heisk. 638, and insisting that the rule ⁴⁸⁴ announced in *Miller v. Morrow*, when first decided and reported in 3 Cold. 587, is the correct doctrine. But we are satisfied, after an extended examination of the cases, that the great weight of authority sustains the ruling in *Sporrer v. Eifler*, 1 Heisk. 633.

Professor Wharton, in his work upon the Law of Evidence, section 697, thus lays down the rule that should govern in such cases: "Under the federal statutes of 1864 and 1866, providing that instruments without stamps should not be received in evidence, the question frequently arose whether stamps were necessary prerequisites to the reception of instruments in state courts. As to this question it is now only necessary to say that if the statutes in this respect controlled the state courts, then there would be no other department of state or local law, whether as to principle or practice, which Congress, at least by subjecting litigation of the particular point to a tax, would not in like manner be able to control. To admit the constitutional right of Congress, therefore, to attach limitations to the reception of evidence in the state courts, would be to admit the right of Congress to control the materials on which the decisions of the courts of particular states should be based. That the limitation in question was not within the power of Congress was ruled by a series of state courts. In other jurisdictions, however, this limitation of the scope of ⁴⁸⁵ the statutes has been denied, though on reasoning which it is difficult to reconcile with the tenor of authorities in this branch of private international law or with the sovereignty conceded by the federal constitution to the states in all matters of process and evidence. A stamp act has no force on the principles of international law, unless imposed by the local sovereignty; and to concede sovereignty to the federal government as to the evidential rules of state courts is to surrender state sovereignty in one of its prime functions."

It is worthy of remark that Professor Wharton, in announcing the rule of evidence on this subject, gives substantially the same reasons as those expressed by Judge Turney in *Sporrer v. Eifler*, 1 Heisk. 633, decided many years anterior. That case was among the first to announce the rule, and its primacy as a precedent has been recognized and followed in the adjudications of other states, until now it is the firmly established doctrine.

It will be observed that the war revenue act of 1898 not only declares that an unstamped deed shall not be received or used as evidence in any court, but adjudges it invalid and of no effect. If the power to invalidate the contracts of the citizens of a state because unstamped resides in the national legislature, it must be derived alone from that provision of the federal constitution which authorizes Congress to levy ⁴⁸⁶ taxes, duties,

imposts, and excises, and to provide for the payment of the debts and expenses of the Union. But, as said by the court in *Latham v. Smith*, 45 Ill. 31, "the power of Congress to tax these instruments can be effectually carried out by the imposition of a fine upon the negligent party, if willfully so, and the innocent payee (or contractee) fully protected without any encroachment upon the right of the state to make the instrument valid as evidence in its own courts, and for all other purposes germane to its execution."

That court further said: "While we concede to the Congress the right to lay and collect taxes, duties, imposts, and excises to pay the debts of the Union, we deny its power to go into the states, and, under a pretense of laying and collecting such taxes, take away from the states legitimate and long-established rights which they have ever, and for their own preservation must be, allowed to exercise without question. The principle of the case of *McCullough v. Maryland*, 4 Wheat. 316, sanctions this view." If our system of government is to remain what the wise and good fashioned it, a strictly federative system, the states sovereign over all subjects within their proper sphere of action, as the general government is over all subjects confided to it by the constitution, then no power exists in the Congress to declare by law what shall or ⁴⁸⁷ shall not be evidence in a state court, and what domestic contracts made by the people of the states, in virtue of their own laws, and having no connection with the federal government, shall be valid or the contrary. The general government is as powerless in this regard as a state would be which should attempt to interfere with the subjects and rights exclusively confided to the "general government."

On this subject the supreme court of Mississippi, in *Davis v. Richardson*, 45 Miss. 499, 7 Am. Rep. 732, said: "Action upon a contract, objection to admitting the written contract as evidence, on the ground that the revenue stamps had not been placed thereon. While the power of taxing the property, occupations, and business transactions, including contracts purely local and domestic, is asserted and sustained, yet it does not draw with it, as an incident, the right to exceed the taxing power. Congress may punish, as it proposes to do in the acts of 1864 and 1866, for an evasion and failure to pay the tax. It may provide stringent means of collection by sale and distress. . . . Under the power to levy and collect taxes all these means may be employed as incidental, but under the tax-

ing power Congress cannot intervene in the states and impose new conditions upon the alienations and conveyances of real estate. It cannot say that a deed, complete and perfect according to the local law, shall not be evidence ⁴⁸⁸ in the state court unless it conforms to a requirement not exacted by the state, but prescribed by Congress."

Knox v. Rossi (Nev.), 57 Pac. 179, 48 L. R. Ann. 305: Depositions objected to on the ground that the certificate was not stamped according to the provision of the revenue act 1898. Following Carpenter v. Snelling, 97 Mass. 452, the court said (quoting from that case): "This provision can have full operation and effect if construed as intended to apply to those courts only which have been established under the constitution of the United States and by the acts of Congress, over which the federal legislature can legitimately exercise control, and to which they can properly prescribe rules regulating the course of justice and the mode of administering justice. We are not disposed to give a broader interpretation to the statute. We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states which shall be obligatory upon them."

Bumpass v. Taggert, 26 Ark. 398, 7 Am. Rep. 623: Suit on unstamped note objected to on ground of noncompliance with the statute. "Since, then, the act does not in terms prescribe such rules to state courts, we must conclude that the provisions of the act were only intended to apply to federal courts, for we cannot by implication hold that ⁴⁸⁹ the intention of Congress was to invade the jurisdiction of the states in the administration of justice between their citizens."

We are aware that a contrary view has been taken of this subject by other courts and jurists of equal eminence to those mentioned. The leading case on that side is Chartier etc. Co. v. McNamara, 72 Pa. St. 278, 13 Am. Rep. 673. Two of the five judges, Chief Justice Thompson and Mr. Justice Sharswood, dissented from the majority, expressly basing their dissent on the ground that this legislation alters a rule of evidence belonging to the state courts.

Without further citation of the cases we hold there was no error in the action of the trial judge in overruling the exception to the admissibility of the deeds in evidence.

It results that the judgment in each case is affirmed.

FIRE INSURANCE.—A CONDITION IN A POLICY of insurance that it shall be void in case the interest of the insured be other than unconditional or sole ownership, has reference only to the quality of the estate or interest, and is not avoided by any sort of an encumbrance: *Caplis v. American Fire Ins. Co.*, 60 Minn. 376, 2 Am. St. Rep. 535, 62 N. W. 440.

EVIDENCE.—AN UNSTAMPED INSTRUMENT is admissible in evidence in a state court, notwithstanding the internal revenue act: *Note to Kennedy v. Roundtree*, ante, p. 841.

EVIDENCE.—CONGRESS HAS NO POWER to regulate the introduction of evidence in the state courts: *Thomas v. State*, 40 Tex. Cr. Rep. 562, 76 Am. St. Rep. 740, 51 S. W. 242.

RIDLEY v. HALLIDAY.

[108 Tenn. 607, 61 S. W. 1025.]

JUDGMENTS—CONCLUSIVENESS AS TO PERSONS NOT IN BEING.—A court of equity has power to bind by its decree converting realty into personalty all the legal or equitable rights or interests, whether vested or contingent, present or future, of all persons, whether in esse or in posse, who are before the court either by service of process or by virtual representation, provided it satisfactorily appears that such conversion is for the best interest of all the parties, and the decree awards them the same interests in the proceeds of the land as they held in the land itself, and provides for the protection thereof. Such decree is binding upon the unborn children and remaindermen of a life tenant, on the theory that they are represented in the litigation by the life tenant, who is served with process.

W. C. Salmon, for the appellant.

J. C. Bradford, E. H. Hatcher, and Figures & Padgett, for the appellee.

608 **BEARD, J.** In 1895 J. W. S. Ridley, by deed of gift, conveyed to his son, Webb Ridley, a valuable farm of five hundred and eighty acres of land, in the county of Maury, upon the following trusts: That the said Webb Ridley, trustee, should permit and suffer his son, William Ridley, for and during his natural life, to have and receive the rents, incomes, and profits of said lands, and to exercise such control over the use, occupation, renting, and cultivation thereof as he, the said William, might deem proper, but in such way, nevertheless, that such lands, and the rents, incomes, and profits thereof, should not in any way be liable for the debts or contracts of the said William; that upon his, the said William's, death said lands should

to his children, and to the living issue of any deceased child, the issue taking the parent's share; that in case William left a widow surviving, she should have the right to occupy the land during her widowhood, sharing equally with the children, or their issue, the rents, incomes, and profits derived therefrom; that should said William at death leave a widow, but no children or issue of children, the trustee should suffer and permit her to receive and enjoy the income of the lands during her ¹⁰⁰ life or widowhood, but so as they should not be liable for her debts or contracts, and that at the death or marriage of the widow, the lands should go to the grantor's other children, and to the issue of such of them as might be dead; that should William die leaving no widow or children, or issue of deceased child or children, the said lands should go to the grantor's other living children, or the issue of such of them as might be dead.

In 1898 the defendants, the two Strudwicks, and one Carpenter, made a written proposition to the trustee and the life tenant, in which they agreed to purchase this property at the price of seventy-five dollars an acre, upon the condition that the latter parties would institute proper proceedings in the chancery court of Maury county, and procure an acceptance of the same.

Upon receiving the proposition the trustee, Webb, and the life tenant, William P. Ridley, at once filed a bill in that court, to which all persons in interest, in esse, were made parties defendant as follows: Annie Halliday and W. P. Halliday, her husband and their minor child, W. P. Halliday, Mary P. Ridley, and the infant children of Webb Ridley. Of these defendants Annie R. Halliday and Mary P. Ridley were the children of the donor, J. W. S. Ridley, and the sisters of the trustee, Webb, and the life tenant, William Ridley.

⁶¹⁰ In this bill, after setting out the deed of gift, the interests created by it, both vested and contingent, and the proposition for its purchase already set out, many reasons were then averred why it was greatly to the interest of all concerned that the same should be accepted. The prayer was that the matter might be referred to the clerk and master to take proof whether such sale would be advantageous, and in the event he should report it was, then that it be made. It was also averred that William Ridley, the life tenant, was unmarried, and that he had never had children born to him.

Answers were filed by the adult defendants and by guardians ad litem duly appointed for the minors. The answer of the

adults conceded that it would be wise to accept the proposition of purchase, while those of the guardians ad litem simply craved the protection of the court for the interest of the minors. The cause then proceeded to a reference to the clerk and master, who, after taking much proof, reported that the offer of purchase from the Strudwicks and Carpenter was a very advantageous one, and recommended its acceptance by the court. This report was unexcepted to, and the chancellor entered a decree of confirmation, and at the same time made provision for the investment of the money received for the purchase of the property, so that the interests of all parties, born and unborn, might ⁶¹¹ be preserved in the fund as they existed, under the deed, in the land itself. From this decree a writ of error has been duly prosecuted.

No question was made in the court below by demurrer, or otherwise, as to the jurisdiction of the chancery court to grant the relief sought by the bill. While if that court had been absolutely lacking in jurisdiction of the subject matter of the cause, then jurisdiction would not have been conferred by this failure to make an objection, by pleading, at the proper time (Richards v. Lake Shore etc. Ry. Co., 124 Ill. 516, 16 N. E. 909), still as a chancery court has unquestionably the power in a proper case, where it has the proper parties before it, to convert realty into personalty (Ruggles v. Tyson, 104 Wis. 500, 81 N. W. 367; Gavin v. Curtin, 171 Ill. 641, 49 N. E. 523), a failure to make objection by some preliminary pleading is a waiver of objection that the court is without jurisdiction to proceed in the cause.

But not only no jurisdictional objection was taken in the court below, none is made here. To the contrary, the power of the court to decree the conversion of the realty into money under the conditions averred in the bill and established by the evidence was conceded there, and is equally conceded in this court. The only question made upon this appeal and by assignment of error is, that as the record shows that the life tenant, William Ridley, was unmarried and without children, ⁶¹² that the decrees pronounced would not bind such children should they hereafter be born to him, upon his possible future marriage, the contention of the appellants being that they are without virtual representation in the case. This insistence rests in part upon section 5086 of the (Shannon's) code, and in part upon the rule of jurisprudence so generally

recognized that no one is bound by a judgment or decree, save parties to the record regularly served and their privies.

What may be the proper construction of this code section we think it unnecessary to determine in this cause. It is one of the sections of chapter 3 of title 2 of part 3 of the code. This chapter is entitled: "Of the Sale of Property of Persons Under Disability," and the body of the chapter is in keeping with the title. Section 5072 (this being the first section of the chapter) provides that "the court of chancery may, for and on behalf of persons laboring under the disability of coverture and infancy, consent to and decree a sale of the property . . . of such persons under the provisions of this chapter," while section 5073 provides that this "application may be made by bill or petition filed by the husband or regular guardian, to which the person under disability is a defendant, to be represented by next friend or guardian ad litem," etc.

The present bill is not filed within these statutory provisions. It is not filed either by a ⁶¹³ husband of a married woman asking a sale of her property, or by a guardian of minors seeking the same relief as to theirs. It is that of a trustee and life tenant, who, bringing all the contingent remaindermen in esse into court, and averring the necessity of such relief, ask that real estate in which these parties have a contingent interest be sold by order of court, and that its proceeds be held subject to the trusts imposed upon the realty. The bill being outside these provisions must rest upon the inherent power of a chancery court to grant such relief, and by its decree for conversion bind parties who may hereafter come into existence.

There is no doubt that if there had been in being, and made a party by proper process to this cause, one of the first class of contingent remaindermen provided for in the trust deed, the decree would have bound all other members of the class who subsequently came into being. That result follows from the doctrine of representation, it being assumed that the living representative would look after the interests of the entire class by bringing to the attention of the court the merits of the controversy, so far as they affected the class. But in the absence of a member of such class, can the decree herein pronounced carry the whole title to the purchasers? This was the purpose in filing the bill, and if it fails in this respect the failure is absolute.

614 It has been held by a large majority of the courts, both English and American, that in certain cases the life tenant will represent contingent remaindermen where no one of the latter is in esse at the time the court is called upon to intervene with regard to the estate in controversy.

In *Finch v. Finch*, 2 Ves. Sr. 492, in passing upon the rule of virtual representation as applied to the sale of land limited in remainder, under a bill to execute trusts, Lord Hardwicke said: "It is admitted to be necessary to bring in the first person entitled to the remainder and inheritance of the estate, if such is in being. It is true, if there is no such person in whom the remainder of the inheritance is vested in being, then it is impossible to say the creditors are to remain unpaid, and the trust be not executed until a son is born. If there is no first son in being, the court must take the facts as they stand. It would be a very good decree, and no son born afterward could dispute it unless he could show fraud, collusion, or misbehavior in the performance of the trust."

In *Leonard v. Sussex*, 2 Vern. 527, there was a tenant for life with remainder to his sons. The tenant for life, before he had a son born, brought a bill against the trustees, in whom the title was vested, for an account which 615 was decreed, and it was held that the account should stand and be binding upon the sons.

In *Gaskell v. Gaskell*, 6 Sim. 643, there was a tenant for life with remainder to his first and other sons in tail of an undivided moiety of certain estates. The tenant for life before a son was born to him filed his bill against his cotenants for partition. Objection was made that the complainant then had no issue in being. But the vice-chancellor (Shadwell) in overruling this objection said the court had frequently decreed partition under such circumstances, and that a decree for partition in that case would be binding upon the tenant in tail when he came into being.

In *Gifford v. Hart*, 1 Schoales & L. 408, Lord Redesdale announced the rule thus: "Courts of equity have determined on grounds of high expediency that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life Where all the parties are brought into court, and the courts act on the property according to the rights that appear without fraud, its decision must of necessity be final

and conclusive. It has been repeatedly determined that if there be a tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court ⁶¹⁶ before he has issue, the contingent remaindermen are bound. This is now considered a settled rule of courts of equity, and of necessity."

Perhaps no one in the history of equity jurisprudence can more properly be said to be a master of the rules and practice of the English chancery courts. Before his elevation as John Mitford he had published a work on "Equity Pleading and Practice," which is regarded as a valuable text-book by the profession to this day. In that work he embodied the rule of virtual representation which he subsequently announced in the case last cited.

Turning to the cases determined by American courts, with the exception of the supreme court of North Carolina, we find them holding the same rule. In *Cheeseman v. Thorne*, 1 Edw. Ch. 629, the vice-chancellor held that the partition proceedings in that case would bind after-born remaindermen under the authority of *Wills v. Slade*, 6 Ves. Jr. 498, even without the aid of statute.

In *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 Am. St. Rep. 693, 32 N. E. 704, in the course of its opinion the court said: "Where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to ⁶¹⁷ deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience and almost necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place, and are secured in same way for such persons."

The case of *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523, is directly in point. The complainant in that case, under the will of her father, was tenant for life, with remainder in fee to her children, or to the issue of any of these children dying during the existence of the life estate, and in the event of her death without children or the issue of such, then remainder over to the testator's sons. Before the birth of any child the life tenant filed a bill for the conversion of this real estate, stating strong equitable grounds therefor, and made as the only defendants thereto her brothers, who were contingent

remaindermen of the second class. It was held that the bill was maintainable, and that the decree for sale of necessity would bind her after-born children.

In addition we refer to *Ruggles v. Tyson*, 104 Wis. 500, 81 N. W. 367; *Sweet v. Parker*, 22 N. J. Eq. 454; *Baylor v. De-jarnette*, 13 Gratt. 152; *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698; *McArthur v. Scott*, 113 U. S. 391, 5 Sup. Ct. Rep. 652.

§18 The authors of works on Equity Pleading and Practice, so far as we have examined, with singular unanimity adopt the same view. Reference is here made to *Mitford on Equity Pleading and Practice*, supra; *Calvert on Parties*, 49-53; *Tyler on Parties*, 24; *Story's Equity Pleading*, sec. 145. In the section referred to Judge Story says: "Doubts were formerly entertained whether in suit in equity for a partition, brought only by or against a tenant for life of the estate, where the remainder is to persons not in esse, a decree could be made which would be binding upon the persons in remainder. That doubt, however, is now removed, and the decree is held binding upon them upon the ground of a virtual representation of them by the tenant for life in such cases."

It is true that this statement of the rule by the author is by its terms limited to cases in partition, but as we have already seen it was applied in *Leonard v. Sussex*, 2 Vern. 527, in the matter of account, and to the enforcement of a trust in favor of creditors by a decree for the sale of lands: *Finch v. Finch*, 2 Ves. Sr. 492. No sound reason has been, or so far as we can discover can be, suggested why it should not apply in any other proceeding where a court of equity is exercising its jurisdictional power in disposing of real estate, the title to which is embarrassed by contingent remainders awaiting unborn remaindermen. If in the one class of cases necessity^{§18} requires an application of the doctrine of virtual representation, why should it not be as operative in the latter? We have held that without the aid of the statute already referred to, a court of equity, in proper cases, has the inherent power to convert, for the benefit of minors, realty into personalty: *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968; *Thompson v. Mebane*, 4 Heisk. 370. In such a case could there be found any solid ground for distinguishing it, so far as this matter of representation is concerned, from a case of mere partition? We think not. If in the case of partition and of the conversion of the property of infants, falling within the inherent jurisdiction

of courts of equity, then why not in every case, where the nature of the trusts and the situation of the property make it eminently judicious if not absolutely essential, in the interest of all persons in esse as well as in posse, that a conversion should take place?

In each case it is essential that the interest of the contingent remaindermen in the proceeds of the converted property be prescribed by the decree directing the conversion: *Monarque v. Monarque*, 80 N. Y. 320. This being done, we see no good reason why the rule of virtual representation should not apply. Even if the limitation or qualification suggested in *Calvert on Parties*, page 52—that is, “that except under very particular circumstances no tenant for life should be capable of maintaining the suit, unless he were one to whose issue there was a remainder in tail”—is to prevail, the present case would fall within its spirit. For here the contingent remaindermen whom the tenant for life represents are not remaindermen in tail, yet they are children who may be born to him, and the children of such as may die during his life.

We have examined the cases from North Carolina referred to in the able and exhaustive brief of the counsel for appellants, and while they are entitled to great consideration, we think they are overborne by the weight of authority. There is nothing in our own cases to exclude us from the rule we have already indicated, and we think that its adoption is consistent with sound policy, and when applied under proper restrictions will work to the advantage of all interests involved.

Before concluding, it is proper to say that upon the authorities it is immaterial whether in such a case the bill is brought by or against the tenant for life: *Gaskell v. Gaskell*, 6 Sim. 643; *Hale v. Hale*, 146 Ill. 257, 33 N. E. 858; *Leonard v. Sussex*, 2 Vern. 527; *Story's Equity Pleading*, sec. 145.

The decree of the court of chancery appeals is affirmed.

JUDGMENT.—PERSONS NOT IN BEING may be bound, when they come into existence, by a judgment rendered against those who represent them: *Harrison v. Walton*, 95 Va. 721, 64 Am. St. Rep. 830, 30 S. E. 872; *Kent v. Church of St. Michael*, 136 N. Y. 10, 82 Am. St. Rep. 693, 82 N. E. 704; *Loring v. Hildreth*, 170 Mass. 328, 64 Am. St. Rep. 301, 49 N. E. 652.

BATEMAN v. RYDER.

[106 Tenn. 712, 64 S. W. 48.]

TROVER AND CONVERSION — MEASURE OF DAMAGES

In actions of trover for the conversion of personalty, chiefly or exclusively valuable to the owner by reason of associations or otherwise, the actual value to him, and not the market value, is the measure of damages, and these should be estimated with reasonable consideration of, and sympathy with, the feelings of such owner.

EVIDENCE — OPINION OF EXPERTS ON INSANITY.

The testimony of experts introduced for the purpose of establishing insanity, or mental unsoundness, if paid for, should be received with great caution and carefully weighed by the jury. An expert physician testifying on such a matter is entitled to charge a reasonable fee for his professional opinion.

Edington & Edington, for the appellants.

G. T. Fitzhugh, for the appellee.

712 WILKES, J. This is an action of trover brought by a mother against her daughter and her husband for the conversion of a guitar, four pictures, and a trunk containing clothing and manuscripts of prose and poetry composed by the plaintiff's former husband.

The action was commenced before a justice of the peace, and the damages were laid at five hundred dollars. There was a trial before the court and a jury on appeal from the justice, when there was a verdict and judgment for two hundred dollars, and defendants have appealed to this court.

The first three assignments go to the measure of damages. Testimony was admitted to show a special value to plaintiff of the articles, because they were gifts from her former husband, and because of the associations connected with them. It is said this was erroneous.

It is said the court charged the jury that in fixing the value of the property they should consider the plaintiff's relations to the same. What the court did charge on this point was "that the jury must determine, from all the evidence on that point, what would be a fair and reasonable value for the property, considering plaintiff's **714** relation to the same and the rights of property." The court, upon request, refused to charge that the action, being in trover for the conversion of property, the measure of damages was the actual value of the property. These assignments may all be treated together.

In actions of trover for the conversion of personal property, as a general rule, the measure of damages is the market or actual value of the property at the date of the conversion: 26 Am. & Eng. Ency. of Law, 818, and authorities there cited. But damages beyond the actual value of the property converted have been allowed the plaintiff when he has been subjected to some special loss or injury: 26 Am. & Eng. Ency. of Law, 849.

“One criterion of damages is the actual value to him who owns it, and this is the rule when the property is chiefly or exclusively valuable to him—such articles, for instance, as family pictures, plate and heirlooms. These should be valued with reasonable consideration of and sympathy with the feelings of the owner”: 3 Sutherland on Damages, 476; *Suydon v. Jenkins*, 3 Sand. 620; *Spicer v. Waters*, 65 Barb. 227.

In *Hale on Damages*, page 182, section 76, it is said: “When property has a peculiar value to the owner, such as it has to no other person, or when it cannot be exactly replaced by other goods of like kind, the actual value to the owner, and not the market value, is the measure of compensation.”

The testimony shows that the four pictures were oil paintings bought in Italy by the plaintiff's husband at a cost of five hundred dollars, and presented to her while traveling, and were valuable intrinsically as well as from association; that the original cost of the guitar was fifty dollars, and it was highly prized for its associations; that there was some considerable clothing in the trunk, besides a lot of manuscript productions in prose and verse of plaintiff's husband, which had never been published, and probably could not be reproduced. There is evidence, on the other hand, that the pictures were not well preserved; that their frames were dilapidated; that they would probably bring about twenty dollars at auction, and that the guitar would perhaps sell for five dollars; that the clothing was worn and old, and of no real value, and that the manuscripts were of no value whatever.

We think the court gave the proper instructions as to the measure of damages, and while we would have been better satisfied with a smaller judgment, there is ample evidence to support the amount given.

It is said that the trial judge erred in charging the jury that “the testimony of experts introduced for the purpose of establishing insanity or mental unsoundness, if paid for, should be

716 received with great caution and carefully weighed by the jury."

The court charged further upon this feature of the case, that "it was lawful and proper for an expert physician to charge a reasonable compensation or fee for his professional opinion or services."

We think that the rule laid down by the trial judge is in substantial conformity to that announced in *Persons v. State*, 90 Tenn. 291, 16 S. W. 726; *Wilcox v. State*, 94 Tenn. 112, 28 S. W. 312.

It is said there is no evidence to support the verdict.

The facts of the case disclose an unpleasant litigation and controversy between a mother and her daughter and her husband. It appears that the mother and daughter were in Los Angeles, California, in 1891. The daughter was then an unmarried woman and boarded with her mother. The mother had also another daughter with her by a second marriage. The two latter came to Memphis in 1891 and left the pictures, guitar, and trunk of clothing and papers with the defendant, paying her board for several months. At the expiration of that time, the board funds being exhausted, the defendant went to San Francisco and engaged in typewriting for a living. She subsequently married the defendant, Bateman, in Honolulu, in 1896.

She states that she sent the trunk to plaintiff 717 to New York. She kept the pictures, as she says, because they had belonged to her father, and she understood had been given to her by her mother. The guitar she claims was given to her by her mother about fifteen years since, to practice on. On the other hand, the mother says that the articles were left with the defendant for convenience and safekeeping, and that the daughter from time to time recognized her ownership in them, and promised to keep them for her.

The character of the plaintiff is attacked for credibility, and testimony is given by an expert physician that she is a lunatic of the type known to physicians as a paranoiac. It is explained that the effect of this special type of the malady is a mania for litigation and an ungovernable desire and anxiety to be successful. It would appear that this species of lunacy or mania is more common among attorneys than litigants. In this case, however, it is alleged to have attacked the client and affected her more than her lawyer.

The court charged the jury, in substance, that they should receive the testimony of experts with caution; that if they found that any witness had been unsuccessfully impeached, or if they were satisfied that any witness was insane or mentally unbalanced, they could disregard such testimony if they saw fit.

718 We think the case was fairly left to the jury, and that there is no reversible error in the record, and the judgment of the court below is affirmed with costs.

THE MEASURE OF DAMAGES for the loss or deprivation of property is generally its market value, yet in some cases its special value to the owner may be considered: See the monographic note *Watt v. Nevada Cent. R. R. Co.*, 62 Am. St. Rep. 792, 793.

AN EXPERT WITNESS IS TO BE JUDGED from the same standpoint as any other witness: *People v. Seaman*, 107 Mich. 348, 42 Am. St. Rep. 326, 65 N. W. 203. An instruction that the evidence of an expert is to be received with caution, as the opinions of such persons, however honestly entertained, may be erroneous, or fatally erroneous: *Louisville etc. Ry. Co. v. Whitehead*, 71 Miss. 1, 42 Am. St. Rep. 472, 15 South. 890.

FEES OF EXPERT WITNESSES are discussed in *North Chicago St. Ry. Co. v. Zeiger*, 182 Ill. 9, 74 Am. St. Rep. 157, 54 N. E. 106; *Bathgate v. Irvine*, 126 Cal. 185, 77 Am. St. Rep. 158, 58 Pac. 442.

Am. St. Rep., Vol. LXXXII—53

CASES
IN THE
SUPREME COURT
OF
VERMONT.

BARRETT v. FISH.

[72 Vt. 18, 47 Atl. 174.]

UNLAWFUL SEIZURE OF LETTERS—BREACH OF TRUST.—That the delivery of private letters to a prosecuting attorney by an agent of their owner is a flagrant breach of trust does not make the receiving of such letters an unlawful search and seizure.

LETTERS AS EVIDENCE—POSSESSION OF STATE'S ATTORNEY.—The fact that private letters are in the possession of a prosecuting attorney is immaterial upon the question of the right to produce them in court.

LETTERS AS EVIDENCE—IMMATERIAL HOW OBTAINED.—For the purpose of determining the admissibility of private letters or other papers in evidence, a court of law will take no notice as to how such letters or papers were obtained.

LETTERS—RESTRAINING PUBLICATION OF.—A COURT OF EQUITY will protect the right of property in private letters by enjoining their unauthorized publication by any person who may attempt or intend such publication, but such protection is based solely on the property right of their owner or possessor.

LETTERS AS EVIDENCE—PRODUCED FOR PURPOSES OF JUSTICE.—For the purposes of public justice publicly administered, private letters in the hands of a party other than the writer must always be produced, unless they would tend to criminate the person required by law to produce them.

LETTERS—VOLUNTARY PRODUCTION IN EVIDENCE—INJUNCTION.—Where the holder of private letters could be compelled to produce them in court, equity will not enjoin their voluntary production by him.

LETTERS AS EVIDENCE—SUIT TO ENJOIN PRODUCTION OF—WHEN RELIEF DENIED.—In a suit by the owner of letters against one in whose possession they are to restrain their production and publication in court, an injunction will be denied where the sole purpose of the proceeding is to enable the owner to obtain possession of such evidence that she may suppress or destroy it, and thus defeat the ends of justice.

Button & Button and H. C. Shurtleff, for the oratrix.

A brief for the oratrix prepared by Stephen C. Shurtleff, deceased, was also submitted.

F. L. Fish, defendant, pro se.

¹⁹ THOMPSON, J. From the agreed statement of facts, the allegations of the bill of the oratrix, and the admissions in the defendant's answer, it appears that the papers in controversy are unsigned letters, written by the oratrix to one Poland, and by him to her; that they were in her possession until shortly before August 21, 1897, when she committed them to the custody of one Hyde with directions to burn them; that while they were in his possession, he delivered them to F. A. Howland August 21, 1897, and subsequently and before the commencement of this suit, Howland delivered them to the defendant, who has ever since retained possession of them against the will of the oratrix. The defendant admits that he intends to publish the letters by using them as evidence in the prosecution of a joint information against the oratrix and Poland by which they are charged with committing adultery with each other, which criminal proceeding is now pending in Addison county court; that the contents of the letters tend to show that there has been undue familiarity and criminal intimacy between the oratrix and Poland; and that she is privileged from producing the letters on trial unless she should be introduced as a witness in her own behalf.

Although counsel for the oratrix has argued the case as if the question of an unlawful search and seizure of her private papers were involved, it is sufficient to say that that question is not involved, as the letters were voluntarily delivered to Howland by the agent of the oratrix. That such delivery was a flagrant breach of trust by Hyde cannot make the receiving of the letters by Howland an unlawful search and seizure.

²⁰ It is not claimed by the defendant that the letters themselves were implements by which the alleged crime was committed. Hence, it is unnecessary to discuss or decide in respect to the right of prosecuting officers to seize or to retain such instruments, when they come into their possession, for use as evidence on the trial of the person charged with the crime, in the commission of which such instruments were used.

The fact that Howland was the state's attorney of Washington county, and that the defendant was state's attorney of Addison county at the time the letters were taken by Howland and

by him delivered to the defendant, gave neither of them any right to take and hold the letters against the will of the oratrix. Nor does the fact that the defendant is still such state's attorney in any way affect the rights of the parties to this suit. He holds them the same as any other person would hold them under like circumstances. As to the defendant, the oratrix is the owner of the letters. It is clear that a court of law will take no notice on trial of a respondent how letters or other papers offered in evidence were obtained, for the purpose of determining their admissibility in evidence: *State v. Mathers*, 64 Vt. 101, 33 Am. St. Rep. 921, 23 Atl. 590; *Jordan v. Lewis*, 2 Strange, 1122; *Stockfleth v. De Tastet*, 4 Camp. 10; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *State v. Atkinson*, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021; *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046; *Williams v. State*, 100 Ga. 511, 28 S. E. 624; *Legett v. Tollervey*, 14 East, 302; 1 Greenleaf on Evidence, sec. 254a. Consequently, the oratrix is remediless at law in the premises, if she is entitled of right not to have the letters published by being read in evidence on her trial for the alleged crime.

A court of equity has jurisdiction to restrain the publication of manuscript writings and the like, against the will of the writer or owner. While there is some conflict among the authorities as to whether that court will restrain the publication of private letters, by a person not authorized to do so by the writer or owner thereof, the view most consonant with reason, justice, and sound public policy is that which holds that a court of equity will protect ²¹ the right of property in such letters, by enjoining their unauthorized publication by any person who may attempt or intend such publication. Such protection is based solely on the property of the writer or possessor of such letters therein: 2 Story's Equity Jurisprudence, 13th ed., 948, 949; 2 Beach on Injunctions, sec. 902; 3 Pomeroy's Equity Jurisprudence, 2d ed., sec. 1353; *Earl of Granard v. Dunkin*, 1 Ball & B. 207; *Earl of Lytton v. Dewey*, 54 L. J. Ch. 293; *Gee v. Pritchard*, 2 Swanst. 419; *Folsom v. Marsh*, 2 Story, 100, Fed. Cas. No. 4901; *Woolsey v. Judd*, 4 Duer, 380; *Grigsby v. Breckinridge*, 2 Bush, 480, 92 Am. Dec. 509; *Hilliard on Injunctions*, 2d ed., 478; note to *Hoyt v. Mackenzie*, 49 Am. Dec. 180-184.

One of the exceptions to this rule is that, "for the purposes of public justice publicly administered, according to the established institutions of the country," private letters in the hands

of a party other than the writer must always be produced, unless such letters would tend to criminate the person required by law to produce them: *Gee v. Pritchard*, 2 Swanst. 427; *Hopkinson v. Lord Burghley*, L. R. 2 Ch. App. 447; 2 Story's *Equity Jurisprudence*, 6th ed., sec. 948. In *Hopkinson v. Lord Burghley*, L. R. 2 Ch. App. 447, the writer of private and confidential letters, relevant to the issue, refused his sanction to their production in court by the person to whom they were written and sent, but the court held that they must be produced "for the furtherance of the ends of justice," although the writer was not a party to the suit. While the letters in question were in the hands of Hyde, the agent of the oratrix, they were not privileged from production in court by him, on the trial of the oratrix and Poland, but if he still held them and declined to voluntarily produce them, he could be compelled by a subpoena duces tecum, to produce them in court to be used as evidence at their trial. Assuming that the defendant has no better right to the possession of the letters than Hyde would have, were they still in his possession, yet the defendant could be compelled to produce them on trial, if he were unwilling to do so, were they in his possession when summoned legally to produce them. He is willing to do voluntarily for the furtherance²² of public justice, administered in due course according to law, what he might be compelled to do. No rights of the oratrix have been infringed by an unlawful search and seizure. By her own folly, important evidence against her and Poland was placed in the hands of Hyde, and through his action it has come to the possession of the defendant. It is apparent that the sole purpose of this proceeding is to enable the oratrix to obtain possession of this evidence that she may suppress or destroy it, so that peradventure the ends of justice may be thwarted. The case falls clearly within the exception stated, and the prayer of the bill cannot be granted.

Pro forma decree reversed and case remanded, with mandate that the bill be dismissed.

EVIDENCE—PRIVATE PAPERS AND LETTERS.—A person is not exempt from producing books or papers material to an inquiry in courts of justice merely because they are private. Letters between a party and his friends are not privileged from discovery: See the monographic note to *Lester v. People*, 41 Am. St. Rep. 393. Consult, also, the note to *Hoyt v. Mackenzie*, 49 Am. Dec. 184. When letters or papers are offered in evidence, the court can take no notice of how they were obtained, whether legally or illegally,

properly or improperly: *State v. Mathers*, 64 Vt. 101, 83 Am. St. Rep. 921, 23 Atl. 590.

LETTERS.—ON PROPERTY IN LETTERS and its protection, see *Dock v. Dock*, 180 Pa. St. 14, 57 Am. St. Rep. 617, 86 Atl. 411; note to *Hoyt v. Mackenzie*, 49 Am. Dec. 180-184.

STATE v. ROWELL.

[72 Vt. 28, 47 Atl. 111.]

PERJURY—INSUFFICIENT INDICTMENT.—Perjury can be committed in testifying at a trial upon an indictment which is finally adjudged insufficient.

PERJURY—WHAT NOT.—IN AN EXTRAJUDICIAL PROCEEDING which is wholly void, where an oath cannot lawfully be administered, perjury by falsely testifying cannot be committed.

PERJURY—NATURE OF PROSECUTION FOR.—A prosecution for perjury is not grounded upon the injury or inconvenience which an individual or the public may sustain, but upon the abuse and insult to public justice.

PERJURY—INDICTMENT—SUFFICIENCY OF.—An indictment for perjury may recite the alleged false testimony to show the crime, but where a great mass of testimony is thrown into an indictment without pointing out in what answers to questions the alleged perjury is contained, the indictment is bad for uncertainty.

Richard A. Hoar, state's attorney, for the state.

George W. Wing and T. R. Gordon, for the respondent.

28 TYLER, J. The respondent was indicted for perjury at the September term, 1896, Washington county court. He filed a demurrer to the indictment, which was overruled, and he was ordered to plead over, without prejudice to the demurrer, and he thereupon pleaded not guilty, was tried by jury at the following March term, and convicted. Sentence was respited, and the cause was passed to the supreme court, was heard at the January **29** term, 1898, when the demurrer was sustained and the indictment quashed. The present indictment was found at the September term, 1897, while the former one was pending in the supreme court, and charges the respondent with perjury in testifying in the trial upon that indictment.

1. The first question is, whether perjury can be committed in testifying in a trial upon an indictment which is finally adjudged insufficient. Perjury is defined by Mr. Bishop as the willful giving, under oath, in a judicial proceeding or course of

justice, of false testimony material to the issue or point of inquiry: 2 Bishop's New Criminal Law, sec. 1015.

The testimony in this case having been given in a judicial proceeding, the court having jurisdiction of the parties and of the subject matter, and the testimony being material to the issue, the elements of the crime of perjury seem to be made out, if well alleged.

The respondent, however, contends that by reason of the insufficiency of the indictment, the trial was only a mistrial, that the proceeding was void, that the court had not jurisdiction of the subject matter of the suit to render a judgment of which the respondent could avail himself in a subsequent prosecution for the same cause—that there was no issue to which the testimony was material.

It is true that in an extrajudicial proceeding, where an oath could not lawfully be administered, perjury by falsely testifying could not be committed. This was so held in *Rex v. Cohen*, 1 Stark. 416, cited in 1 Bishop's New Criminal Law, section 440, note. There a statute provided that upon the death of a coplaintiff the suit should abate unless the death was suggested upon the record, and a coplaintiff dying after issue joined without such suggestion, a trial was extrajudicial, and perjury could not be assigned upon any false testimony given. And in *Commonwealth v. White*, 8 Pick. 452, a justice of the peace tried and convicted a person for ⁸⁰ a certain misdemeanor under a statute that had been abrogated by a subsequent one, which gave jurisdiction to the court of common pleas; held, that the whole matter was *coram non iudice*, that an oath could not lawfully be administered, and therefore the defendant could not have committed perjury in testifying. Numerous cases of this kind might be cited, where, the proceedings being void, it was held that perjury could not be assigned. In this case the indictment was regularly found, the trial court held it sufficient and tried the respondent upon it, but this court held it insufficient in not alleging that the writing which the respondent was charged to have sworn falsely to was one which the law required to be verified by oath. A judgment upon a verdict of guilty would have been valid unless reversed, and a judgment upon a verdict of acquittal would have been a bar to another prosecution for the same offense.

The trial court had power to hear and determine the cause, and this constituted jurisdiction of the subject matter: *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758; *Perry v. Morse*, 57

Vt. 509. The case, therefore, is entirely different from one where the oath is administered by a person having no legal authority for so doing, as by a person acting merely in a private capacity, or who has authority to administer certain oaths but not the one in question, or by one who has authority seemingly colorable, but which is in fact unwarranted and merely void. In such cases the oath is not perjury, for it is altogether idle: 1 Russell on Crimes, 2d ed., 520. The case is not different in principle from one where there is a mistrial by reason of error in the admission or rejection of evidence, or in instructions to the jury, or where judgment is arrested by reason of a defect in the declaration, in which cases it could not be seriously contended that false testimony did not constitute the alleged crime.

If the crime of perjury consisted wholly of the wrong done in procuring an unjust verdict, there would be a semblance of reason in claiming that when the verdict was set aside by reason of an insufficient indictment the proceeding was a nullity, and ²¹ perjury had not been committed. But a wrong verdict, though it may be the result of perjury, is not its essence. All the authorities agree that a prosecution for the offense is not grounded upon the injury or inconvenience which an individual or the public may sustain, but upon the abuse and insult to public justice: 2 Chitty on Criminal Law, 157; 7 Bacon's Abridgment, 426. Accordingly, it is held that it is immaterial whether the false oath is credited by the triers of the fact or not, or whether the person to whose prejudice it was taken is damaged by it or not: 7 Bacon's Abridgment, 426; 2 Bishop's New Criminal Law, sec. 1028.

So it has been held that a witness is guilty of perjury who testifies falsely to a material fact, although he was not competent as a witness in the case, or to prove the particular fact concerning which he testifies: *Chamberlin v. People*, 23 N. Y. 85, 80 Am. Dec. 255.

It is laid down in 2 Russell on Crimes, sixth edition, 318, that perjury may be committed on the trial of an indictment which is afterward held bad upon a writ of error, and *Regina v. Meek*, 9 Car. & P., is cited as authority. There it was objected that the evidence of the defendant could not have been material, as the former indictment was held bad upon a writ of error for an insufficient assignment of perjury, but the objection was overruled, the court remarking that it would be rather too much to say that whether a witness had committed perjury

or not could depend upon the validity in point of form of the indictment as to which he had testified. The ruling sustaining the state's demurrer to the respondent's plea was correct.

2. This indictment is demurred to as insufficient. The simplified form under No. 29, Acts of 1890, Vermont Statutes, §417, form 48, is:

{
'State of Vermont, }
.....County. } ss.

"Be it remembered that at a term of the county court, begun and held at, within and for the county of aforesaid, on the day of, ^{ss} A. D., the grand jurors within and for said county of, upon their oath present that A B, of, in the county of, at, in the said county of, on the day of, in the year of our Lord eighteen hundred and, appeared as a witness in a proceeding in which C D and E F were parties, then and there being heard before a tribunal of competent jurisdiction, and committed the crime of perjury, by testifying in substance as follows: (Here set out the matter sworn to and alleged to be false), which said testimony was material to the issue then and there pending in said proceeding, against the peace and dignity of the state."

This form is followed in the present case down to and including the charge that the respondent "committed the crime of perjury," where it is alleged that he "then and there falsely testified in answer to interrogatories substantially as follows," and then follows more than six hundred questions to and answers by the respondent, covering nearly forty printed pages, and concluding with the words, "which said testimony was material to the issue then and there pending in said prosecution, contrary to the form of the statute," etc.

The indictment, without the testimony, only alleges that the respondent was a party to a proceeding tried in the county court, that he appeared as a witness therein, and that, being sworn to tell the truth relative to such proceeding, he committed the crime of perjury, and the alleged false testimony is recited to show the crime.

The indictment cannot be held good unless it can be construed to allege that the respondent swore falsely in his answers to each and every interrogatory. It cannot be so construed. It would be absurd to give it the construction that he swore falsely about his name and residence, for they are given by

him the same as they are stated in the body of the indictment. Neither is it presumable that it was intended to charge that he swore falsely when he testified that he was a taxpayer in Montpelier, and as such, in the year 1895, made out and signed his inventory ²³ and handed it to one of the listers. The same may be said of many other answers given by him in the course of his examination.

There being no designation of the matter or matters in the respondent's testimony that are claimed to be false, the indictment is bad for uncertainty. It does not apprise him of the cause and nature of the accusation against him.

The state relies upon *State v. Camley*, 67 Vt. 323, 31 Atl. 840, as authority for sustaining this indictment, for there, when the specification of perjury is reached, certain questions and answers are recited which do not appear in the published case. While that case is authority for holding that the perjury need not be assigned otherwise than by reciting the testimony, it is not authority for holding that a great mass of testimony may be thrown into an indictment without pointing out in what answers to questions the alleged perjury is contained.

The pro forma ruling is reversed; demurrer sustained; indictment held insufficient, and quashed.

TO CONSTITUTE PERJURY THERE MUST BE a willful, corrupt, and false swearing or affirming; the testimony must be material to the issue; the witness must know his statements to be false and they must be given with intent to mislead the court or jury. *Coyne v. People*, 124 Ill. 17, 7 Am. St. Rep. 324, 14 N. E. 668. A mere voluntary or extrajudicial oath cannot constitute perjury. See the monographic note to *State v. Shupe*, 85 Am. Dec. 491.

ON INDICTMENTS FOR PERJURY and their sufficiency, *Rahm v. State*, 30 Tex. App. 310, 28 Am. St. Rep. 911, 17 S. W. 416; monographic note to *State v. Shupe*, 85 Am. Dec. 494-499.

HAWLEY v. HURD.

[72 Vt. 122, 47 Atl. 401.]

TRUSTEE PROCESS—DEBT PAYABLE OUTSIDE OF STATE.—A resident trustee is chargeable upon a debt payable to a nonresident in the state of his domicile.

GARNISHMENT—NEGOTIABLE PAPER—TRANSFER TO BANK WITHOUT THE STATE.—Under a general statute providing that negotiable paper may be attached by trustee process before notice of transfer, but which exempts such paper from attachment when transferred to banks in the state, negotiable paper transferred

o a bank without the state may be attached by trustee process before notice of transfer, and such discrimination is not unconstitutional.

TRUSTEE — DEFENSE.—A trustee can defend upon the ground of rights acquired by an assignee who does not appear.

CONSTITUTIONAL LAW—IMMUNITIES OF CITIZENS.—CORPORATIONS are not citizens within the meaning of article 4, section 2, of the United States constitution, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

CONSTITUTIONAL LAW — ABRIDGING PRIVILEGES OF CITIZENS.—CORPORATIONS are not citizens within the meaning of article 14, section 1, of the amendments to the United States constitution, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

CONSTITUTIONAL LAW — PERSONS WITHIN STATE — EQUAL PROTECTION OF LAWS.—A foreign corporation not doing business within a state is not within the protection of article 4, section 1, of the amendments to the United States constitution, which declares that no state shall deny to any person "within its jurisdiction" the equal protection of the laws.

CONSTITUTIONAL LAW—NATIONAL BANKS.—A STATE can exercise no control over a national bank, nor in any wise affect its operation except as Congress may permit, but this protection is limited to such legislation as tends to impair its utility as an instrumentality of the federal government.

NATIONAL BANKS — CONTROL BY STATE.—As regards the construction of contracts, the acquisition and transfer of property, the collection of debts, and the liability to suit, a national bank remains under the control of the state.

Barber & Darling, for the plaintiff.

W. B. Sheldon, for the trustee.

123 MUNSON, J. The plaintiff and the trustee are residents of this state, and the defendant is a resident of New York. The indebtedness on account of which the trustee was held chargeable in the court below was evidenced by two promissory notes, executed by the trustee in this state, made payable to the defendant's order at the First National Bank of Hoosic Falls, New York, and discounted by that bank in the regular course of business before notice of the service of the trustee process was received.

It is not necessary to consider the conflicting decisions concerning the location of a debt for purposes of attachment. It is held in this state that a resident trustee is chargeable upon a debt payable to a nonresident in the state of his domicile: *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134. In this case the court expressly refused to be governed by *Towle v. Wilder*, 7 Vt. 622, saying there was nothing to show upon what point

that case turned. In saying, as the court did in *Craig v. Gun*, 67 Vt. 92, 30 Atl. 860, that it found no occasion to depart from the decision in *Towle v. Wilder*, 57 Vt. 622, it evidently assumed that the case was disposed of upon the question of jurisdiction over the trustee, for *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134, was cited as determinative of the other points involved.

Vermont Statutes, 1306, first provides, generally, that negotiable paper may be attached by trustee process before notice of transfer. It provides further, however, that negotiable paper actually transferred ¹²⁴ to a bank in this state before due shall be exempt from such attachment. This leaves paper transferred to a bank without the state to be governed by the general provision; and the trustee contends that this restricted exemption works a discrimination against national banks without the state, from which they are protected by article 4, section 2, of the federal constitution, and article 14, section 1, of the amendments thereto.

Although this question is raised by the trustee, and without the bank being made a party, it is to be considered and determined as if presented by the bank as claimant of the fund. A trustee can defend upon the ground of rights acquired by an assignee who does not appear: See *Holmes v. Clark*, 46 Vt. 23. If these notes have become payable to the bank by virtue of transfer which the federal constitution requires us to recognize, the trustee cannot be held.

Article 4, section 2, provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. Corporations are not citizens within the meaning of the term as here used: *Paul v. Virginia*, 8 Wall. 168; *Pembina etc. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737. It is true that many of the reasons given for this holding are inapplicable to corporations created by act of Congress, and that the rights of national banks were not involved in any case which asserts the rule. But the distinction suggested cannot be made without ignoring the positive statement of the cases cited, that the term applies only to natural persons.

Article 14, section 1, of the amendments provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. It is held in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. Rep. 281, that a corporation is not a citizen within the mean-

g of this provision; and the extended discussion in earlier cases as to what privileges and immunities were intended seems to exclude the ¹²⁵ possibility of an exception in favor of national banks: See Slaughter-House Cases, 16 Wall. 36.

The section last cited also declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. The term "person" as here used is held to include corporations: Minneapolis etc. R. R. Co. v. Beckwith, 129 U. S. 53, 9 Sup. Ct. Rep. 207. But this check upon the state relates only to persons "within its jurisdiction." A corporation not created by this state, nor doing business here under conditions that subject it to process issuing from the courts of this state, is not within its jurisdiction: Blake v. McClung, 172 U. S. 39, 19 Sup. Ct. Rep. 165.

It must be remembered, however, that the right of a national bank to protection from state interference does not depend upon its being brought within any of these provisions. As an instrumentality of the federal government, it is protected from hostile legislation by the supremacy of the federal constitution. Independently of specific prohibitions, the state has no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of constitutional laws enacted to carry into execution the powers vested in the general government: McCulloch v. Maryland, 4 Wheat. 316. The state can exercise no control over a national bank, nor in any wise affect its operation, except as Congress may permit: Farmers' etc. Bank v. Dearing, 91 U. S. 29.

But there is a well-recognized limitation to the protection which this federal supremacy secures to a national bank. It protects the bank only from such legislation as tends to impair its utility as an instrumentality of the federal government: Waite v. Dowley, 94 U. S. 527. As regards the construction of contracts, the acquisition and transfer of property, the collection of debts, and the liability to suit, the bank remains under the control of the state: First Nat. Bank of Louisville v. Kentucky, 9 Wall. 353.

¹²⁶ The most that can be said of the discrimination complained of is, that it enables a bank within the state to discount with safety paper which a bank without the state could not discount without risk, and that to this extent it operates as an incidental restriction upon the business of the latter bank. It is clear that this touches only the general business relations

of the bank, and can have no appreciable effect upon its continuance and utility as an agent of the federal government.

It is not claimed that our statute is in conflict with any act of Congress.

Judgment affirmed.

GARNISHMENT.—THE SITUS OF DEBTS for the purpose of garnishment is considered in the monographic note to *National Bank v. Furtick*, 69 Am. St. Rep. 113-127. See, also, *Central of Georgia Ry. Co. v. Brinson*, 109 Ga. 354, 77 Am. St. Rep. 382, 38 S. E. 597.

A CORPORATION IS A PERSON within the meaning of a constitutional provision that no person shall be deprived of life, liberty, or property without due process of law: *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682, 53 S. W. 955. See also, *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 59 Pac. 304. It is not, however, a citizen within the provision of the federal constitution declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states: *Phoenix Ins. Co. v. Commonwealth*, 5 Bush 68, 96 Am. Dec. 831; *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 523. See, further, the monographic note to *State v. Goodwill*, 25 Am. St. Rep. 878.

HOLDEN v. RUTLAND RAILROAD COMPANY.

[72 Vt. 156, 47 Atl. 408.]

RAILROADS—REFUSAL TO TRANSPORT PLAINTIFF—COMPLAINT—DEMURRER.—Where a plaintiff is entitled to transportation over the defendant's road on a ticket for which he contracted and paid, but through the negligence of the defendant's agent the ticket fails to show such right, and the defendant refuses to transport him, a complaint which alleges such breach of duty and that the plaintiff has used due care, entitles him to nominal damages at least, and a demurrer cannot be sustained on the ground that the allegations of the complaint do not show any damages to the plaintiff for which he can sustain an action.

ACTION—FORM OF—TORT OR CONTRACT.—Where from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action.

RAILROADS—FORM OF ACTION—CASE.—Where a railroad company is under a duty to deliver to a plaintiff such a ticket as will entitle him to transportation upon presentation on its trains, he can maintain an action on the case for the damages accruing to him from a breach of such duty.

Edward H. Deavitt, for the plaintiff.

Frederick H. Button, for the defendant.

157 THOMPSON, J. The declaration alleges that the plaintiff applied to the defendant's ticket agent at Burlington, Vermont, for such a ticket as would entitle the plaintiff to be transported by the defendant over its railroad the distance of one thousand miles, and that he paid twenty dollars for such ticket, and thereupon received from said agent a ticket, which he represented to the plaintiff entitled him to be so carried over the defendant's railroad; that in writing on said ticket the name of the person entitled to use it said agent carelessly and negligently, and without the fault of the plaintiff, wrote thereon the name of A. F. Holden, instead of D. F. Holden, the name of the plaintiff; that thereafterward, while there were still attached to said ticket coupons representing more than sixty-even miles, the distance between Burlington and Rutland, the defendant received the plaintiff as a passenger upon its train to transport him from Burlington to Rutland, and that while he was being so transported the defendant refused, by its conductor, to receive said ticket in payment of plaintiff's fare. Other facts are set forth, and other wrongs and injuries are alleged in the declaration, which it is not necessary for us to consider under the defendant's general demurrer. There is an allegation that all the wrongs and injuries set forth were the direct result of said carelessness and negligence of said agent, and without lack of due care on part of the plaintiff.

The plaintiff was entitled to transportation on the ticket for which he contracted and paid, and is entitled to at least nominal damages for the neglect and refusal of the defendant to transport him. It is not necessary to decide, and it is not adjudged, whether he is entitled to recover for other damages under his declaration. As he is entitled to nominal damages at least, the demurrer cannot be sustained on the ground that the allegations of the declarations do not show any damages to the plaintiff for which he can sustain an action.

158 The defendant contends that the plaintiff has mistaken the form of his action, and that it should have been assumpsit instead of case. Without doubt he could maintain an action of assumpsit on a promise implied by law from the facts stated in his declaration, but that is not decisive of his right to maintain an action on the case. In 1 Chitty on Pleading, fourteenth American edition, *135, the rule is stated to be this: "Where from a given state of facts the law raises a legal obligation to

do a particular act, and there is a breach of that obligation, and a consequential damage there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach": *Burnett v. Lynch*, 5 Barn. & C. 609. It was the duty of the defendant, under the facts stated in the declaration, to deliver to the plaintiff such a ticket as would entitle him to the transportation on its railroad for which he paid, and upon presentation of such ticket to transport him on proper trains until it was used up. For the breach of this duty, arising from the negligence of the defendant's agents, which in law is its negligence, the plaintiff can maintain an action on the case for the damages accruing to him from such breach of duty.

The pro forma judgment sustaining the demurrer and adjudging the declaration insufficient and for the defendant to recover its costs is reversed, and the demurrer is overruled and the declaration is adjudged sufficient, and cause remanded.

ACTION—ELECTION TO SUE IN TORT OR CONTRACT.—Where a duty is imposed by law, by reason of the relations of the parties, although the relation was created by contract, a neglect to perform this duty gives the injured party a right of action, and he may elect to sue upon the contract, or treat the wrong as a tort, and bring an action *ex delicto*: *Kansas City etc. R. R. Co. v. Becker*, 67 Ark. 1, 77 Am. St. Rep. 78, 53 S. W. 406. Where the duty for whose breach an action is brought would not be implied by law by reason of the relations of the parties, whether such relations arose out of contract or not, and its existence depends upon the fact that it has been expressly stipulated for, the remedy is in contract and not in tort; when otherwise, case is an appropriate remedy: *Nevin v. Pullman etc. Co.*, 106 Ill. 222, 46 Am. Rep. 688.

McINTYRE v. WILLIAMSON.

[72 Vt. 183, 47 Atl. 786.]

TRUSTEE—PERSONAL LIABILITY.—One in whom a legal estate is vested, and who acts for himself in managing it, may be held personally liable upon dealings with third parties relative to the estate, notwithstanding that in such dealings he designates himself "trustee."

TRUSTEE—PERSONAL LIABILITY—ACTING FOR ESTATE.—A trustee may be held personally liable upon dealings in behalf of the trust estate, and within the limits prescribed by law, and the fact that the parties with whom he dealt knew of the trust and that he was dealing on its account will not protect him.

TRUSTEE—HOW RELIEVED FROM PERSONAL LIABILITY.—A trustee, in transactions relating to the trust, can relieve himself from personal liability only by a definite understanding that the transactions were had upon some other responsibility.

TRUSTEES—RULES OF AGENCY INAPPLICABLE TO. The rules which determine the liability of an agent are not applicable to trustees.

Haskins & Schwenk, for the plaintiffs.

Waterman & Martin and Clark C. Fitts, for the defendant.

¹⁸³ **MUNSON, J.** The action is general assumpsit. The court directed a verdict for the defendant on a motion which assigned ¹⁸⁴ as grounds therefor that the plaintiffs dealt with the defendant in his capacity as trustee, and that the plaintiffs' testimony disclosed no cause of action under the pleadings. The case stands upon the plaintiffs' exception to this ruling.

The dealings upon which the suit is based were had by and with the defendant as "trustee." He could become personally holden notwithstanding the use of this term. The legal estate was in him, and he was acting for himself in managing it. His official title served only as a personal description, and so separate the dealings from those pertaining to his personal matters. If he dealt in behalf of the trust estate, and within the limits prescribed by law, he can secure reimbursement from the fund. But the parties with whom he dealt can hold him personally liable, whatever his situation as regards the trust estate. The fact that they knew of the trust and that he was dealing on its account will not protect him. He could relieve himself from personal liability only by a definite understanding that the transactions were had upon some other responsibility.

It was error to direct a verdict for the defendant upon the case disclosed by the evidence: 27 Am. & Eng. Ency. of Law, 221; 1 Parsons on Contracts, *121; *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111; *United States Trust Co. v. Stanton*, 139 N. Y. 531, 34 N. E. 1098; *Mulrein v. Smillie*, 25 App. Div. 135, 48 N. Y. Supp. 994; *Hackman v. Maguire*, 20 Mo. App. 286; *Glenn v. Allison*, 58 Md. 527.

The decisions of this court to which we are referred are not at variance with the rule above stated. In *Blaisdell v. Stevens*, 16 Vt. 179, *Townsley v. Barber*, 27 Vt. 417, and *Walston v. Smith*, 70 Vt. 19, 39 Atl. 252, the question was as to the rights acquired against the beneficiaries by conveyances from or dealings with the trustee. The other cases cited were cases of agency, and the rules which determine the liability of an agent are not applicable to trustees.

Judgment reversed and cause remanded.

TRUSTEE—PERSONAL LIABILITY.—A contract with a trustee, though for the benefit of the trust estate, imposes upon him a personal liability merely, in the absence of an express provision to the contrary; and a person so contracting with the trustee cannot proceed directly, in the first instance, against the trust estate: *Note to Connally v. Lyons*, 27 Am. St. Rep. 941. A trustee authorized to make expenditures on the estate, and having no trust funds on hand, may, by express agreement, exempt himself from liability therefor, and make the expenditure a charge upon the estate; but in the absence of such agreement he is individually liable: *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111.

FARR v. BRIGGS.

[72 Vt. 225, 47 Atl. 793.]

PENAL STATUTES — WHERE ENFORCEABLE. — Penal statutes are not enforceable in other states than the ones in which they are enacted.

CORPORATIONS—DIRECTORS' LIABILITY FOR DEBTS. Where the purpose of a statute is to furnish a remedy to the creditors of a corporation who have been injured by the directors' violation of the requirements of the statute, the liability imposed upon such officers is contractual, and actions upon such statutes can be brought in any state in courts of competent jurisdiction.

CORPORATIONS—DIRECTORS' LIABILITY—SURETIES. Under a statute which imposes upon the directors of corporations who assent to the creation of debts beyond a certain limit a personal liability to the creditors for such debts, the liability arises out of the assent to the contract creating the debt, and is similar to that of sureties and guarantors.

W. L. Burnap and Powell & Powell, for the plaintiff.

Clark C. Briggs and Seneca Haselton, for the defendant.

²²⁵ TYLER, J. Appeal from the disallowance of a claim by the commissioners upon the estate. The following are the material facts alleged in the declaration and admitted by the demurrer:

The Vermont Investment Company was a corporation created and organized in May, 1882, under the laws of South Dakota, and having offices and places of business in that state ²²⁶ and in Burlington, Vermont, for the negotiating of loans and the sale of promissory notes and other securities.

The statute under which the corporation was created contains the following provision:

“The directors of corporations must not make dividends except from the surplus profit arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase their capital stock, except as especially provided by law. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen), are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section.”

The capital stock issued and subscribed for was five hundred and twenty-three shares of the par value of one hundred dollars per share; yet the directors contracted debts and liabilities against the corporation largely in excess of the stock subscribed.

George C. Briggs, of Burlington, was a stockholder in the corporation, was duly constituted a director thereof, and qualified and acted as such while it continued to do business. He attended its meetings, participated in its transactions, expressed no dissent to the creation of debts as aforesaid, and caused none to be entered upon its records.

The corporation sold to the plaintiff in this state and guaranteed the payment of various notes to a large amount, and thereby became liable to pay the same to him at maturity if the makers failed to pay them.

²²⁷ The plaintiff demanded payment of the notes and obligations so purchased by him, as they respectively fell due, of the makers, and upon failure of payment by them, made demand of payment of the corporation pursuant to its guaranty. The corporation became insolvent and was dissolved in December, 1893, and all its assets were exhausted, whereupon the plaintiff presented his claim against Briggs' estate upon the ground that, as one of the directors of the corporation, by virtue of the statute, Briggs became liable to pay him the amount of his debt against the corporation and that the claim survived against his estate.

The statute of South Dakota evidently was the general law of that state under which all business corporations were required to be organized. Upon the election of the directors they became subject to all its requirements and liable to the corporation and to its creditors, within that state at least, for a violation thereof. The question is whether the statute had any extraterritorial force—whether creditors outside the limits of that state have any remedy by virtue of its provisions.

It is well settled that penal statutes will receive no recognition and are not enforceable in other states than the ones in which they were enacted: Story on Conflict of Laws, secs. 620, 621; Halsey v. McLean, 12 Allen, 439, 90 Am. Dec. 157, and notes; Blaine v. Curtis, 59 Vt. 120, 59 Am. Rep. 702, 7 Atl. 708; Adams v. Fitchburg etc. R. R. Co., 67 Vt. 76, 48 Am. St. Rep. 800, 30 Atl. 687. The plaintiff concedes this to be the rule of law, but contends that the statute under which the present action is brought is not penal, but contractual. The defendant estate claims that the statute is strictly penal.

Statutes similar to that under which the present action is brought, making the directors of business corporations personally liable for their default in the performance of certain prescribed duties, have received much consideration by law-writers and courts. In Cook on Corporations, section 223, Morawetz on Corporations, section 907, and Thompson on Corporations, sections 3052 and 4164, it is said that such statutes have generally been held to be penal. Courts of high authority have so held. In First Nat. Bank v. Price, 33 Md. 488, 3 Am. Rep. 204, a Pennsylvania statute ²²⁸ which provided

that, if any debts or liabilities should be contracted exceeding the amount of the capital stock of the corporation actually paid in, the directors and officers contracting the same should be jointly and severally liable in their individual capacity for the whole amount of the excess, and that the same might be recovered in an action of debt, was considered as imposing a penalty, and that it could only be enforced in the state which enacted it. In *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146, the same doctrine was held under the statute of another state which provided that officers of certain corporations should be personally liable for the debts of the corporation in case they neglected to file an annual report showing the financial condition of the corporation: See, also, *Stokes v. Stickney*, 96 N. Y. 323; *Carr v. Rischer*, 119 N. Y. 117, 23 N. E. 296. The same was held in *Derickson v. Smith*, 27 N. J. L. 166; *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14; *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. Rep. 554.

In *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224, the court gave construction to a New York statute, in violation of which the defendant, as a director of a business corporation, signed and made oath to a certificate which he knew to be false—that the whole of the capital stock of the corporation had been paid in, when in fact no part of it had been paid in. The statute made him liable for all the debts of the corporation, which included that of the plaintiff. The question whether this was a penal statute, having no force out of the state where enacted, was elaborately discussed by the court and this statement of the law was laid down: “The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.”

The court held that the act was in no sense criminal or quasi criminal; that it made the stockholders individually liable ²²⁹ for the debts of the corporation until the capital stock was paid in and a certificate was filed, and made the officers liable for any false and material representation in the certificate; that the individual liability of the stockholders takes the place of a corporate fund until that fund has been duly created, and that the individual liability of the officers takes the place of the corporate fund, in case their statement that it has

been duly created is false; that the statute gives a civil remedy at the private suit of the creditor only, and, measured by the amount of his debt, it is, as to him, clearly remedial; that to maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under the laws to an individual; that it is not a penal law in the sense that it cannot be enforced in a foreign state or country.

In *Neal v. Moultrie*, 12 Ga. 104, the charter of a bank provided that the total amount of the debts which the corporation should at any time owe should not exceed three times the amount of stock paid in, and made the directors liable for such excess; held, that as a right of action and recovery was given to individuals, or a particular class of individuals, the act was remedial and not penal. The court remarked that the act not only looked to the interests of the public at large, but "it was also a measure of individual security which created rights in individual citizens."

In *Witters v. Foster*, 26 Fed. 737, cited by defendant, which was a bill of revivor, the original bill charged the intestate, with other directors of a bank, with neglect of duty in not requiring a bond of the cashier, in allowing persons to become indebted to an amount exceeding one-tenth of the capital, and in reckoning assets as good as a basis of dividends, when they were worthless, etc., in violation of United States statutes. These statutes gave no remedy to the creditors or stockholders, and the court held that the ground of the orator's claim was the personal and official guilt of the intestate, for the omission of duties which, had they been performed, might have ²³⁰ benefited the assets of the bank, and that the cause of action did not survive. The same court, *Wheeler, J.*, in an action to enforce the personal liability of directors of a corporation under a Vermont statute, which provided that the corporation should not contract debts exceeding three-fourths the amount of its capital paid in, and made the stockholders and directors personally holden to the creditors if the indebtedness should exceed that amount, held that the directors' liability for the debt arose out of the assent to the contract creating the debt and was that of contracting debtors, and clearly drew the distinction between such a statute and one that declared liability for some act or neglect in no way connected with the contracting of debts, as for neglect to file reports, which the court said was penal: *Field v. Haines*, 28 Fed. 919. See, also,

Boston etc. R. R. Co. v. Graves, 80 Fed. 588, where this distinction is maintained; Cook on Corporations, sec. 1; Thompson on Corporations, secs. 4166, 8525, 8526; Morawetz on Corporations, sec. 908.

The defendant cites *Windham Prov. Inst. v. Sprague*, 43 Vt. 502, which arose under the same statute as *Field v. Haines*, 28 Fed. 919, and to enforce a similar liability. The court used the expression that "the creation of this additional liability seems to have been intended as a check upon the directors and stockholders in the contraction of debts, and to have been imposed, in some sort, as a penalty." It also said: "To visit this penalty upon any others than those who caused the infraction of the charter would be manifestly unjust," etc. The word "penalty" may have been used inadvertently; it clearly was used in no other sense than that a party should make pecuniary payment for the breach of his contract.

Cady v. Sanford, 53 Vt. 632, was a case against the defendants as directors of a corporation organized under the laws of this state, which made them personally liable for debts contracted before publishing the articles of association. The liability of the directors was treated as contractual, though the case was decided for the defendants upon the ground that their ²⁸¹ liability was only collateral to that of the company, and that no debt against the company had been established.

Blaine v. Curtis, 59 Vt. 120, 59 Am. Rep. 702, 7 Atl. 708, was an action to recover a penalty imposed by the statute of New Hampshire for taking unlawful interest. The statute was held to be penal, but the court said: "If it only gave a remedy for an injury against the person by whom it was committed to the person injured, and limited the recovery to the mere amount of loss sustained, or to cumulative damages as compensation for the injury sustained, it would fall within the class of remedial statutes." This is the rule laid down in *Boies v. Booth*, 2 W. Black.: "That where the damages are given wholly to the party injured, as compensation for the wrong and injury, the statute having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is not penal, properly so called, but remedial."

It appears by the cases above referred to that it was the doctrine of this court long before *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224, was decided, that where the purpose of a statute is to furnish a remedy to creditors who have been injured by the directors' violation of the requirements of the

statute, the liability of such officers is contractual, and actions upon such statutes are transitory and can be brought in any state in courts of competent jurisdiction.

Some of the decisions by courts of other states in which a different doctrine has been held have been rendered upon statutes not containing the remedy for creditors, which is expressly provided in the South Dakota statute. That statute clearly is not penal either in its letter or intent, but it grants a right of action to private persons who have suffered pecuniary injury in consequence of certain officers of corporations violating the statute to recover damages of those officers, the extent of whose liability is the amount of pecuniary loss sustained by such private persons—creditors of the corporation. No public wrong was committed when the directors exceeded the prescribed limit in creating debts. The creditors were the only persons upon whom a wrong was committed, and they have a remedy by virtue of the ²³² quasi contract which the directors entered into with them when the sales of securities were made, to the effect that the directors were not exceeding the prescribed limits in creating debts. The obligation which the statute imposed upon the directors not to create debts beyond a certain limit entered into the contracts of sales of securities which the directors made through their agents. The directors created the debt in this jurisdiction, and the statute of the sister state fixes the extent of their liability, which does not arise from their personal misconduct merely, irrespective of its effect upon the property rights of others, but, as was said by the court in *Field v. Haines*, 28 Fed. 919, "the liability arises out of the assent to the contract creating the debt." As was said in *Windham Prov. Inst. v. Sprague*, 43 Vt. 502, in respect to directors: "They can keep the indebtedness of the company within the limits fixed by the legislature, or they can extend that indebtedness beyond that limit and voluntarily take upon themselves the relation of joint debtors to the creditors of the company." The liability is similar to that of sureties and guarantors, and evidently was imposed partly for the purpose of inducing the directors to perform their prescribed duties, and partly as a means of securing the creditors of corporations from losses occasioned by the acts of their officers.

Pro forma judgment reversed; demurrer overruled; declaration held sufficient; cause remanded.

A PENAL STATUTE IS NOT ENFORCEABLE in another state: *Adams v. Fitchburg R. R. Co.*, 67 Vt. 76, 48 Am. St. Rep. 800, and note, 80 Atl. 687.

CORPORATIONS.—THE STATUTORY LIABILITY of officers of a corporation for failure to perform prescribed duties has generally been considered penal in its nature: See the monographic note to *Attrill v. Huntington*, 14 Am. St. Rep. 352. But there is authority to the contrary: See *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, ante, p. 801, 59 S. W. 952.

STATE v. ADAMS.

[72 Vt. 253, 47 Atl. 779.]

RES JUDICATA—CRIMINAL PROCEEDING.—A judgment of acquittal on a charge of keeping liquors with an unlawful intent is conclusive in favor of the defendant, who is claimant in a proceeding for the condemnation of the same liquors for keeping with an unlawful intent, where the unlawful intent is referable to the same date, and the court finds that he was the owner of such liquors.

RES JUDICATA—CRIMINAL JUDGMENT IN CIVIL PROCEEDING.—While ordinarily a judgment in a criminal case cannot be used in a civil action as proof of the facts determined, yet the mere fact that one proceeding is civil and the other criminal does not render the doctrine of res judicata inapplicable.

RES JUDICATA—PROCEEDING IN REM AND INTER PARTES.—While a proceeding by the state to condemn liquors is in its nature a proceeding in rem, yet, as to a claimant of such liquors, it is a proceeding inter partes, and he is entitled to the benefit of a previous adjudication of the question in a proceeding between himself and the state.

RES JUDICATA—MUTUALITY OF RIGHT.—As regards the use in a civil case of a judgment in a criminal case as a prior adjudication, where the state and the claimant are the parties in both cases, there is mutuality of right between the state and the claimant.

J. G. Sargent, state's attorney, for the state.

William E. Johnson, for the claimant.

²⁵⁴ MUNSON, J. This is a proceeding for the condemnation of certain liquors found in the possession of the claimant. On trial, the claimant offered a certified copy of the record of his acquittal on a charge of keeping with unlawful intent, and, in connection therewith, evidence that both proceedings related to the same liquor. The court found that the liquors sought to be condemned were the property of the

claimant, and the same as those involved in the prior adjudication, but excluded the record of the judgment as immaterial.

It appears then to have been judicially ascertained, in a proceeding between the state and this claimant as a respondent, that these liquors were not kept with an intent to dispose of them unlawfully, and if that fact were shown in this proceeding, it would be conclusive against the right of condemnation. It is apparent that a finding as to intent upon one day would not be conclusive as to the intent upon some other day; but counsel treat both these proceedings as referable to the same date, and we take that to be the meaning of the exceptions.

²⁵⁵ It is said that this proceeding is civil, and not criminal, in its nature, and that a judgment in a criminal case cannot be used in a civil action as proof of the facts determined. Undoubtedly, the rules governing the admissibility of judgments will ordinarily prevent this use, but the mere fact that one proceeding is civil and the other criminal does not render the doctrine of *res judicata* inapplicable.

But it is said that the doctrine is applicable only where the parties are the same, and that the parties to the record offered and the parties to this proceeding are not the same. It is true that this is in its nature a proceeding *in rem*; but when one comes in as a claimant it is, as to him, a proceeding *inter partes*, and he is entitled to the benefit of a previous adjudication of the question in a proceeding between himself and the state: *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. Rep. 437.

It is objected further, however, that there must be mutuality of right, and that if the judgment rendered had been in favor of the state, it could not have been produced against the claimant. We see no reason why it could not. The proceeding was one in which the respondent was entitled to a jury, and to testify in his own behalf, and to have the fact ascertained beyond a reasonable doubt. He could have been entitled to no greater safeguards upon an inquiry in this proceeding.

Judgment reversed and cause remanded.

RES JUDICATA.—FOR NUMEROUS APPLICATIONS of the doctrine of *res judicata*, see *Watson v. Richardson*, 110 Iowa, 698, 80 Am. St. Rep. 331, 80 N. W. 416; notes to *Gayer v. Parker*, 8 Am. St. Rep. 229-231; *Hawk v. Evans*, 14 Am. St. Rep. 250-252; *Sloan v. Price*, 20 Am. St. Rep. 356.

EVIDENCE.—RECORDS OF THE CONVICTION or acquittal of a party, in a criminal prosecution, are not usually evidence of the facts on which they are based, in any civil action: Note to

Steel v. Cazeaux, 13 Am. Dec. 291; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98. In some cases, however, a conviction in a prior prosecution has been admitted against the party convicted in a civil action for the same wrong: Note to Steel v. Cazeaux, 13 Am. Dec. 291; Anderson v. Anderson, 4 Greenl. 100, 16 Am. Dec. 237; Griffin v. Sellars, 2 Dev. & B. 492, 81 Am. Dec. 422.

KILPATRICK v. GRAND TRUNK RAILWAY COMPANY.

[72 Vt. 263, 47 Atl. 827.]

NEGLIGENCE — CONTRIBUTORY — REMOTE. — When the negligence of a plaintiff does not occur at the time of the accident, but is prior thereto, it is not mutual with that of the defendant, and is not one of the proximate causes of the accident.

CONTRIBUTORY NEGLIGENCE — STATUTORY DUTY. A plaintiff who is guilty of contributory negligence cannot recover, even when the injury arises from the neglect of the defendant to observe a statutory duty.

NEGLIGENCE — WHEN A QUESTION OF LAW. — When the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive, one way or the other, as to leave no reasonable doubt about it.

CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW. One who attempts, in the night-time, with a lantern in his hand, to board a freight train running faster than a man can run, is guilty of negligence as a matter of law.

Young & Young and E. A. Cook, for the plaintiff.

C. A. Hight, L. L. Hight, and Chamberlain & Rich, for the defendant.

²⁶⁴ TAFT, C. J. 1. The injury to the plaintiff was caused by his attempting to board a moving freight train by means of a ladder placed upon the side of a car. Vermont Statutes, section 3886, reads as follows: "No railroad company shall run cars of its own with ladders or steps to the top of the same on the sides of its cars, but said ladders or steps shall be on the ends or inside of the cars." Section 3887 provides that a railroad corporation not complying with the requirements of section 3886 shall be liable for the damages and ²⁶⁵ injuries to employes on its roads, resulting from such neglect. By force of the statute, the defendant is liable for any injury to one of its employes resulting from its neglect in not placing a ladder or steps upon the end or inside of the car. The car in ques-

tion was one belonging to the defendant, and it was its duty, which it failed to perform, to equip it as provided in the section referred to. The plaintiff, therefore, is entitled to recover, unless barred by the fact that he assumed the obvious dangers of the risk, or is chargeable with contributory negligence.

As we dispose of the case upon the question of contributory negligence, we do not consider whether the plaintiff is barred from recovering by having assumed the obvious dangers of his employment. The point in respect to the special finding is not insisted upon by the defendant.

2. Did the court err in ruling that the question of contributory negligence was not in the case?

It is urged by the plaintiff that the case is analogous to one arising under Vermont Statutes, sections 3871 and 3877, relating to cattle-guards, which provide that a corporation owning or operating a railroad shall construct and maintain cattle-guards at all farm and railroad crossings, and fences along the right of way sufficient to prevent cattle and animals from getting on the railroad and making the corporation liable for the damages done by its agents or engines to cattle, horses, or other animals thereon, if occasioned by want of such fences and cattle-guards.

It was long since held under this statute that a railroad company was liable when a horse, which was killed, was an estray, and had escaped from the pasture through the negligence and carelessness of its owner. There are several cases in the late volumes of the reports which hold the same doctrine. These cases can well be put upon the ground that the negligence of the plaintiff, in permitting his animals to escape, stray away, and pass upon the railroad track, was remote and not proximate. If the negligence of the plaintiff consisted in his negligently driving ²⁰⁶ cattle upon the track at the time of the accident, it might well be claimed that such negligence was proximate, not remote, and that his neglect would bar a recovery.

When the negligence of the plaintiff did not occur at the time of the accident, but was prior thereto, and consisted in permitting his animals to stray away, it is not mutual with that of the defendant, and was not one of the proximate causes of the accident, for in the use of the words "proximate cause," negligence occurring at the time the injury happened is meant.

The case, in principle, is analogous to the one which formerly arose under the provisions of our early statutes, which enacted that "if any special damage shall happen to any person, his team, carriage, or other property, by means of the insufficiency or want of repairs of any highway or bridge in any town, which such town is liable to keep in repair, the person sustaining such damage shall have the right to recover the same," etc. In these cases, it has been universally held that if the plaintiff is guilty of contributory negligence, as one of the proximate causes of the accident, if his negligence contributes to his injury to any extent, he is not entitled to recover. But in such highway cases it was held that when the plaintiff's negligence consisted in taking a road constructed to avoid the dangerous place, which caused the accident, the plaintiff was not barred from a recovery for the reason that his negligence was remote, not proximate: *Templeton v. Montpelier*, 56 Vt. 328.

The question of proximate and remote cause arose in *Davis v. Central Vermont R. R. Co.*, 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313, in which the defendant was negligent in not forwarding grain in its elevators at Ogdensburg. The elevators burning without fault on the part of the forwarders, the defendant was adjudged not liable, for that the fire was the proximate, and the delay to forward only the remote, cause of the damage.

"That a person guilty of contributory negligence should not recover even when the injury arises from neglect to observe a statutory duty is not only reasonable but clear law, for in such a case the plaintiff has failed to establish the proposition on which alone he is entitled to recover damages—that the injury happened through the defendant's negligence": *Bevan on Negligence*, 2d ed., 765.

To entitle the plaintiff to recover, the cause of the injury must be the negligence of the defendant and that only. He is entitled to no relief if the injuries resulted from negligence of his own combined with that of the defendant. The rule is the same whether the negligence is by the common law or statutory. The negligence of the statutory duty may involve the person guilty thereof in penalties, yet the law will not allow the injured person to recover because he himself contributes to the injury.

3. Should the question of contributory negligence have been submitted to the jury, or was it one of law? The rule with us is: "When the standard of negligence is not prescribed,

and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive one way or the other as to leave no reasonable doubt about it—no room for opposing inferences. This is clearly shown by the adjudged cases": *Worthington v. Central Vermont R. R. Co.*, 64 Vt. 107, 23 Atl. 590; *Magoon v. Boston etc. R. R. Co.*, 67 Vt. 177, 31 Atl. 156. Can it be said in this case that the facts and circumstances are so decisive as to leave no reasonable doubt about it—no room for opposing inferences? The plaintiff attempted to climb upon a moving car in a train which was running faster, as he says, than he could run—moving at the rate of eight or nine miles an hour. It was in the evening—dark; he had a lantern in his hand, and attempted to board the train by getting hold of the ladder and passing upon it to the top of the car. In his first attempt he failed, tried again, and was injured before he could pass up the ladder to the top of the car. There can be but one inference from the testimony in the case, and that is, that the plaintiff was guilty of negligence in attempting in the night-time, with a lantern in his hand, to board a ²⁶⁸ freight train running as rapidly as he says this was; that it must be held to be negligent for any person so to do.

The plaintiff being thus negligent, as matter of law, was not entitled to recover, and the ruling of the court, therefore, that the question of contributory negligence was not in the case was error.

Judgment reversed and cause remanded.

CONTRIBUTORY NEGLIGENCE, TO DEFEAT a right of action, must be simultaneous and co-operating with the fault of the defendant: *Wilmot v. Howard*, 89 Vt. 447, 94 Am. Dec. 338. It must be the proximate cause of the injury: *North Birmingham Ry. Co. v. Calderwood*, 89 Cal. 247, 18 Am. St. Rep. 105, 7 South. 36). Negligence of a plaintiff remotely connected with an injury will not prevent him from recovering damages against a defendant whose negligence has been the immediate and proximate cause of the injury: *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552.

THE QUESTION OF NEGLIGENCE is one of law where the facts are uncontroverted: *Gonzales v. New York etc. R. R. Co.*, 38 N. Y. 440, 98 Am. Dec. 58; *Harris v. Cameron*, 81 Wis. 239, 29 Am. St. Rep. 891, 51 N. W. 437. The court may, as a matter of law, determine the question of contributory negligence, where the facts are undisputed, and but one reasonable inference can be drawn from them: *McQuillan v. Seattle*, 10 Wash. 464, 45 Am. St. Rep. 799, 38 Pac. 1119.

SARTWELL v. SOWLES.

[72 Vt. 270, 48 Atl. 11.]

JURISDICTION—MOTION TO DISMISS—ORAL EVIDENCE.—Where it appears from the writ and is conceded that the date of the writ has been altered, oral evidence, upon a motion to dismiss for want of jurisdiction, is admissible to show the true date of the writ.

RES JUDICATA—VACATION OF JUDGMENT OF JUSTICE—AUDITA QUERELA.—Where the judgment of a justice of the peace is vacated, in an action of audita querela, upon the ground that he had no jurisdiction of the subject matter, the question of his want of jurisdiction thereby becomes res judicata.

EJECTMENT—TITLE—JURISDICTION OF JUSTICE. The object of an action of ejectment is not merely to recover the possession of lands, but to settle the title and establish the right of property, and the title to land being necessarily involved in such an action, a justice of the peace is without jurisdiction.

VOID PROCESS—WRIT OF POSSESSION—JUSTIFICATION.—Where it appears from a writ of possession that the judgment on which it was issued was rendered by a justice of the peace, and that it was for the plaintiff to recover his title and possession of the land in question, the writ, showing a judgment without the jurisdiction of the justice, is void on its face, and affords no protection to anyone acting under it.

STATUTE OF FRAUDS—WAIVER OF DEFENSE.—The defense that a contract is within the statute of frauds is waived by allowing it to be established by parol evidence without objection.

LANDLORD AND TENANT—ORAL LEASE—TENANCY AT WILL AND FROM YEAR TO YEAR.—An oral lease of land for a term of years creates an estate at will, with the right of possession in the lessee as long as he is allowed to occupy the land, and such an estate may ripen into a tenancy from year to year, entitling the lessee to six months' notice to quit before yielding possession to the lessor.

ARBITRATION—REVOCATION OF SUBMISSION.—A submission to arbitration may be revoked by either party, at any time before an award is made and published, notwithstanding an agreement not to revoke, and when the submission is revoked it is no bar to a subsequent action.

APPEAL—EXCESSIVE VERDICT—SETTING ASIDE. The action of a trial court in overruling a motion to set aside a verdict on the ground that the damages are excessive is not revisable on appeal.

APPEAL.—THE GRANTING OF A CERTIFIED EXECUTION rests largely in the discretion of the trial court upon the facts found by it, and is not revisable on appeal.

Trespass. Pleas, the general issue, liberum tenementum, and justification under legal process. A motion to dismiss for want of jurisdiction was overruled. It appeared by the writ of possession and was conceded that the date of the writ had

been altered. Oral evidence was admitted to prove its true date. The defendants' ninth and tenth requests to charge, and the first separate request of the defendant Ladd, were based on the claim that the writ of possession was proper in form, and on its face appeared to have been regularly issued in a proceeding of which the magistrate had apparent jurisdiction which he had properly exercised. The defendants' twelfth, thirteenth, and fourteenth requests to charge were based on the claim that by virtue of the terms of the agreement of submission to arbitration, prospective profits from the land could not be considered in arriving at the amount of damages. Judgment for the plaintiff, and a certified execution was awarded.

E. A. Ayres and C. G. Austin, for the plaintiff.

E. A. Sowles, Willard Farrington, and A. A. Hall, for the defendant.

274 WATSON, J. The evidence to show the true date of the writ was admissible, and the motion to dismiss, for want of jurisdiction, was properly overruled: *Hopkins v. School Dist.*, 27 Vt. 281.

After the plaintiff had been in possession of the farm for more than two years, carrying it on under his contract, defendant Sowles, as administrator of the estate of William L. Sowles, brought his action of ejectment in the statutory form—not a justice ejectment under the forcible entry and detainer act—against the plaintiff, returnable before a justice of the peace, but in the declaration his seisin and possession were alleged to be in his own right in fee, and not in his representative capacity. Judgment was rendered for the plaintiff therein to recover the seisin and peaceable possession of the farm in question, and a writ of possession was issued upon that judgment.

The writ of possession was put into the hands of defendant Ladd, a deputy sheriff, for service, whereupon the defendants went to the farm, and Ladd quietly and peaceably moved the household goods and other personal effects of the defendant therein into the highway and put Sowles into possession of the farm; and Ladd seeks to justify his acts in this behalf, in the suit at bar, under the writ of possession. The plaintiff, in this suit, contends that the justice had no jurisdiction of the subject matter, and therefore the writ of possession affords no justification.

At the April term, 1898, of Franklin county court the judgment of the justice was vacated in an action of *audita querela*

brought for that purpose, and it was adjudged therein that the justice was without jurisdiction of the subject matter, and ²⁷⁵ the judgment of the justice and the writ of possession thereon were set aside and held for naught. No exception was taken thereto, and the question of want of jurisdiction in the justice thereby became *res judicata*. But it is said that Ladd, not being a party to the action of *audita querela*, is not affected by the judgment therein. Assuming, but not deciding, this to be so, we examine the question as to whether the justice had jurisdiction.

The object of the action of ejectment in this state being not merely to recover the possession of lands, but to settle the title and establish the right of property, and the judgment, when recovered, being, as between the parties, their heirs and assigns, conclusive evidence of that title (Vt. Stats. 1492; *Payne v. Payne*, 29 Vt. 172, 70 Am. Dec. 402; *Marvin v. Denison*, 20 Vt. 162), the plaintiff in the action before the justice, in order to recover, was obliged to show title in himself to the land in question, which is conclusive that the title to land was involved within the meaning of section 1040 of the Vermont Statutes, as held in *Jackway v. Barrett*, 38 Vt. 316, and in *Dana v. Sessions*, 63 Vt. 405, 21 Atl. 922. Clearly, the justice was without jurisdiction.

The grounds of the defense made rendered the judgment of the justice, the writ of possession, and the proceedings in relation to the action of *audita querela* material, and the same were admissible in evidence. At the close of the evidence each defendant moved for a verdict, but it does not appear from the exceptions that any grounds were stated upon which the motions were based, and therefore, in disregarding them, there was no error: *State v. Nulty*, 57 Vt. 543.

The court held that the writ of possession and the judgment upon which it was issued were void; that the defendants were trespassers and liable for actual damages, to which holding the defendants excepted. The justice being without jurisdiction of the subject matter, as hereinbefore shown, not only was the judgment void, but the ²⁷⁶ writ of possession issued thereon was void also. It has been argued in behalf of defendant Ladd that notwithstanding the judgment and writ of possession were void, inasmuch as a writ of possession may be issued by a justice upon a judgment in an action under the forcible entry and detainer act, the officer would not know but that the writ in

question was thus issued, and therefore it affords justification for his acts under it.

In actions of ejectment, if judgment is rendered for the plaintiff, he shall recover his damages and the seisin and possession of the premises: Vt. Stats. 1491. And the prescribed form of the writ of possession to be used upon such a judgment states that, by the consideration of the court named therein, the plaintiff has recovered judgment for his title and possession of and in the realty therein described: Vt. Stats. 5417, form 5.

In actions before a single justice under the forcible entry and detainer act, against a tenant holding over without right, exclusive of rents and costs, the plaintiff can have judgment only for the possession of the premises, and a writ of possession shall issue accordingly: Vt. Stats. 1563. The clause that a writ of possession shall issue accordingly means that the writ shall be so drawn in form and substance as to comply with the law upon which the action is based, and that it shall be within the scope of the judgment upon which it is issued.

It appeared by the writ of possession under which defendant Ladd acted that the judgment on which it was issued was rendered by the subscribing justice, and that it was for the plaintiff to recover his title and possession of the farm in question. The law permitting such a judgment to be rendered was without the jurisdiction of the justice, and the defendant was bound to know the law.

The writ, therefore, was not fair on its face and afforded no justification to anyone acting under it: *Driscoll v. Place*, 44 Vt. 252; *Carleton v. Taylor*, 50 Vt. 220. It follows that the defendants were trespassers and liable for actual damages, as held by the court, and that their ninth and tenth requests to charge, ²⁷⁷ and defendant Ladd's first request, were unsound and properly refused.

Whether the contract was within the statute of frauds need not be considered; for if it was, the defendants have waived that defense by allowing the contract to be established by parol evidence without objection, and it must be enforced as proved: *Montgomery v. Edwards*, 46 Vt. 151, 14 Am. Rep. 618; *Battell v. Matot*, 58 Vt. 271, 5 Atl. 479; *Pike v. Pike*, 69 Vt. 535, 38 Atl. 265.

The defendants' second request to charge was as follows: "If the jury find that the plaintiff leased the premises without writing for five years, as plaintiff's evidence tends to show, still the defendant, as administrator, would be in the lawful pos-

possession of the premises, by his servant, the plaintiff, under the circumstances at the time of the alleged ejectment from the premises, as his testimony tends to show, and this action could not be sustained."

Such a lease would have had the effect of creating an estate at will (Vt. Stats. 2218), with the right of possession in the lessee as long as he was allowed to occupy and carry on the farm thereunder; and such an estate may ripen into a tenancy from year to year, thereby entitling the lessee to six months' notice to quit before yielding possession of the premises to the lessor: *Amsden v. Atwood*, 69 Vt. 527, 38 Atl. 263; 67 Vt. 289, 31 Atl. 448. This request was unsound in principle, and properly disregarded.

Defendants contend that, by reason of the submission to arbitrators, the plaintiff is barred from maintaining this action, and that his only remedy is upon the bond given by the defendant Sowles, to abide and perform the award. This contention is untenable. Notwithstanding the agreement not to revoke the submission, either party had the right so to do at any time before an award was made and published: *Aspinwall v. Fousoy*, 2 Tyler, 328; *People v. Nash*, 111 N. Y. 310, 7 Am. St. Rep. 747, 18 N. E. 630. And when the submission was revoked, it was no bar to this action: *Chitty on Contracts*, 884; *Day v. Essex County Bank*, 13 Vt. 278 97. Therefore, in refusing to comply with defendants' twelfth, thirteenth, and fourteenth requests, there was no error.

The action of the county court in overruling defendants' motion to set aside the verdict on the ground that the damages were excessive is not revisable here: *Sowles v. Carr*, 69 Vt. 414, 38 Atl. 77.

The granting of a certified execution rested largely in the discretion of the county court upon the facts found by it, and is not revisable in this court: *Melendy v. Spaulding*, 54 Vt. 517.

This disposes of all the questions raised by the exceptions in which defendants, in argument, claimed there was error, and none other are considered.

Judgment affirmed.

Start, J., dissents.

EJECTMENT.—ON THE NATURE of actions and the conclusiveness of judgments in ejectment, see the note to *Caperton v. Schmidt*, 85 Am. Dec. 208-211; *Breon v. Robrecht*, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 88.

PROCESS—PROTECTION OF.—Where process is void on its face, an officer acting under it is not protected: *Tellefsen v. Fee*, 168 Mass. 188, 60 Am. St. Rep. 379, 46 N. E. 562. Want of jurisdiction apparent on the face of process deprives an officer of his justification for an act done under it. The process that shall protect an officer must be fair on its face: See the monographic note to *Savacool v. Boughton*, 21 Am. Dec. 195, 199. A writ of possession, fair and regular on its face, and issued by a court having jurisdiction of the action, constitutes a protection to the officer who executes it: *State v. Devitt*, 107 Mo. 573, 28 Am. St. Rep. 440, 17 S. W. 900.

ON PLEADING THE STATUTE OF FRAUDS, and the necessity thereof, see the monographic note to *Jordan v. Greensboro Furnace Co.*, 78 Am. St. Rep. 648-658.

ARBITRATION.—A PARTY MAY REVOKE a submission to arbitration at any time before an award. But this rule applies only to cases of bare submission: *McKenna v. Lyle*, 155 Pa. St. 599, 5 Am. St. Rep. 910, 26 Atl. 777. See further, *Zehner v. Lehigh Coal etc. Co.*, 187 Pa. St. 487, 67 Am. St. Rep. 586, 41 Atl. 464.

POST v. KENERSON.

[72 Vt. 841, 47 Atl. 1072.]

EVIDENCE — MEMORANDA OF PAYMENTS TO DECEDENT.—Private memoranda of payments made to a decedent are inadmissible in a suit by the administrator, since the law will not permit a party to make a memorandum of a fact and introduce it as evidence of that fact when he is by statute denied the right to testify.

EVIDENCE — ACCOUNT-BOOKS — TEST.—The manner of keeping accounts and their purpose, rather than the form of the books themselves, is the important consideration in determining whether they are entitled to be received as independent evidence.

EVIDENCE — ORIGINAL ENTRIES. — MERE PRIVATE MEMORANDA cannot be received as independent evidence without proof that they were made as original entries.

EVIDENCE.—PRIVATE MEMORANDA can only be referred to by a witness to refresh his recollection of what transpired, when they were made at the time of or soon after the transaction.

EVIDENCE — ACCOUNT-BOOKS — INDEPENDENT EVIDENCE.—Account-books kept by a defendant, in which entries are honestly made in the usual course of his business, and which include credits for goods received and charges for drafts accepted, are admissible as independent evidence of the fact of the acceptance of such drafts.

Farrington & Post, for the plaintiff.

Wilson & Hall, for the defendant.

841 TYLER, J. The court below found that the plaintiff decedent owned a farm in Swanton, from which butter was shipped to the defendant for sale on commission; that the de-

defendant received ³⁴² the butter charged in the last fourteen items of the plaintiff's specification, and was accountable for it at the prices carried out, which amounted to six hundred and ninety-eight dollars and ninety-seven cents. The plaintiff claimed that six hundred and thirteen dollars and sixty-six cents of this amount remained unpaid, while the defense was that payments had been made to more than cover the entire amount. The question was whether two certain drafts drawn by the decedent upon the defendant had been accepted by him. It had been the decedent's practice to draw upon the defendant, at thirty or sixty days, for round sums, generally even hundreds of dollars, on the strength of shipments about to be made. Such drafts were accepted by the defendant, and during the life of the acceptance butter was received and sold by him and accounts of sales were rendered by him to the decedent. If the drafts of August 7 and August 31, 1889, were in fact accepted by the defendant, then nothing was due from him to the decedent's estate, and this depended upon whether the defendant's books were admissible as independent evidence of the fact of such acceptance. The other party to the contract being dead, they could not be used by the defendant as memoranda. The court finds in relation to these books:

"Three books, introduced by the defendant, are submitted herewith, that their exact character may be ascertained by examination. They were the only books kept by the defendant. The entries were made in due course as the transactions occurred. They embrace credits for goods received and charges for drafts accepted. We have found nothing in our examination of them to indicate that they were not honestly kept, but they do not always contain the material necessary for the statement of a complete account, as is apparent from an examination of the Burton entries from the settlement of July 3, 1888, to the first credit now in controversy. Charges to balances are made and memoranda of settlement entered where the items included do not show a balance."

The books are memorandum-books in form, rather than regular account-books, though the pages are four inches wide by ³⁴³ eight long, and ruled with money columns. On the fly-leaf of each is written, "B. F. Kenerson's Butter Book," and they purport to contain memoranda of the defendant's butter transactions with various persons. The manner in which these memoranda were kept is illustrated by the following quotation:

"3d May.

" O. A. Burton Cr.

"By 3 tubs butter 85

"61^s—9^s, 62—9^s 83

"61^s—9 May 18

"185—28^s—157 18 25.61

Dr.

"To acceptance

" 30 days 200.00"

The manner of keeping the accounts and their purpose is the important consideration, rather than the form of the books themselves. An original entry may be made upon a diary, or a book or paper, and be entitled to be received as independent evidence: *Gleason v. Kinney*, 65 Vt. 560, 27 Atl. 208. If the books only contained memoranda of payments to Burton, they would have been inadmissible, for the law will not permit a party to make a memorandum of a fact and introduce it as evidence of that fact when he is by statute denied the right to testify to it: *Paris v. Bellows*, 52 Vt. 351. Nor can mere private memoranda, without proof that they were made as original entries, become independent evidence: *Godding v. Orcutt*, 44 Vt. 54; *Barber v. Bennett*, 58 Vt. 476, 56 Am. Rep. 565, 4 Atl. 231. Such entries can only be referred to by a witness to refresh his recollection of what transpired, when they were made at that time of, or soon after, the transaction: *Barber v. Bennett*, 62 Vt. 50, 19 Atl. 978; *In re Diggins*, 68 Vt. 198, 34 Atl. 696.

These books were the only ones kept by the defendant; the entries were honestly made and in the usual course of his business, and included credits for butter received and charges for 344 drafts accepted. They were properly received in evidence under the Vermont Statutes, 1239.

Judgment affirmed.

BOOKS OF ACCOUNT AS EVIDENCE are considered in the monographic note to *Union Bank v. Knapp*, 15 Am. Dec. 191-193. Such books need not be kept in any particular form to entitle them to admission: *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501. An account-book of original entries, fair on its face and shown to have been kept in the usual course of business, is evidence even in favor of the party by whom it is kept: *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754.

STATE v. DOHERTY.

[72 Vt. 381, 48 Atl. 658.]

HOMICIDE—PREMEDITATION—EVIDENCE OF PREPARATION.—In a prosecution for murder, evidence which shows any fact which constitutes preparation for the act is relevant. Hence testimony indicating that the accused, the night before the homicide, purchased a revolver and cartridges is admissible as tending to show that the homicide was premeditated.

HOMICIDE—PREMEDITATION—EVIDENCE TO REBUT.—Where the defendant, the night before the homicide, purchased the revolver with which he did the killing, evidence that some five months before he had a worthless revolver, which he had thrown away, is not relevant as tending to show that it was nothing new for him to have one, as bearing on the question of premeditation.

EVIDENCE—REMOTENESS—APPEAL.—The question whether evidence offered is too remote from the transaction to be admissible is one for the trial court to determine, and will not ordinarily be revised on appeal.

HOMICIDE—SELF-DEFENSE—EVIDENCE.—In a prosecution for murder against one who purchased a revolver the night before the homicide, where the defense is that the revolver was purchased for the general purpose of self-protection against others as well as the deceased, testimony offered to show that threats of personal violence had been made against the accused by others is properly excluded, where there is no offer to show the time when such threats were made.

HOMICIDE—TRIAL—RIGHT TO EXAMINE QUESTION BEFORE IT IS PUT.—In a prosecution for murder, counsel for the defendant have no legal right to examine a question asked by the prosecution before it is put.

TRIAL—RIGHT TO EXAMINE QUESTION—OBJECTION TO EVIDENCE.—Where no other objection than the one taken can be made to a question, it is not prejudicial error to deny to opposing counsel the right to examine the question before it is put.

WITNESSES—EXPERT—HYPOTHETICAL QUESTION.—A hypothetical question asked of a medical expert witness may be based upon a portion of the testimony in the case.

HOMICIDE—INTENT—TESTIMONY OF ACCUSED.—The failure of an accused, who testifies in his own behalf, to testify concerning his intent immediately preceding the killing, where he has testified as to his intent just before that time, is a circumstance for the jury to consider in determining the degree of the crime which he has committed.

HOMICIDE—FEAR AND COWARDICE—HEAT OF BLOOD. Fear, fright, nervousness, and cowardice are placed on the same plane with anger and heat of blood, so far as they relate to the commission of a homicide.

HOMICIDE—MANSLAUGHTER—FEAR AND EXCITEMENT.—If the drawing and use of a revolver by an accused is an afterthought subsequent to the encounter with the deceased, and wholly due to the then nervousness, excitement, fear, anger, and

heat of blood of such accused, the offense is manslaughter, and not murder.

HOMICIDE — MANSLAUGHTER — JUSTIFICATION FOR FEAR.—If, at the time of the commission of a homicide, the elements of fear, excitement, and nervousness are without such provocation as the law regards as sufficient justification for anger and heat of blood, the killing is murder, and not manslaughter.

HOMICIDE — JUSTIFIABLE — SELF-DEFENSE — FEAR.—Where an accused, who sees another approaching him in a hostile attitude, and has reason to believe that such other intends to kill him or to do him great bodily harm, shoots such person through fear, nervousness, excitement, and fright, it reasonably appearing to him that he could defend himself in no other way, the homicide is justifiable as being done in self-defense.

INSTRUCTIONS—ABSTRACT QUESTION.—A court is not required to give an instruction upon an abstract question, there being no evidence in the case upon the point.

HOMICIDE—MUTUAL COMBAT—FIRST BLOW.—In cases of mutual combat it is not important to the character of the killing which party gave the first blow.

HOMICIDE—MUTUAL COMBAT—INTENT.—If one draws his sword before the other has attempted to draw his and thrusts his antagonist through the body, whereby he dies, it is murder, for it shows the purpose of killing in the first instance.

HOMICIDE — INSTRUCTION — SUPERIOR STRENGTH.—Upon a trial for murder, it is not error to refuse to state the questions of superior strength and health of one and disease and weakness of the other in a charge which refers to the use of a revolver by the accused.

HOMICIDE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—INSANITY.—In order to grant a new trial to one who has been convicted of murder, on the ground that since the trial evidence has been discovered which shows that the defendant was not guilty by reason of insanity, the newly discovered evidence must be of such a character as to leave a reasonable doubt of the defendant's guilt when taken in connection with all the rest of the testimony.

Richard A. Hoar, state's attorney, for the state.

Frank Plumley and Edward H. Deavitt, for the respondent.

³⁸⁹ TAFT, C. J. 1. Testimony was introduced upon the part of the state tending to show that the respondent, the night before the homicide, went to Waterbury and purchased a revolver and cartridges, as tending to show the homicide was premeditated. This was legitimate testimony, for any fact "which constitutes a preparation for an act" is relevant (Stephen's Digest of Evidence, 2d ³⁹⁰ Am. ed., 19), and tends to show premeditation. The respondent testified he bought the revolver and cartridges to defend himself in proper protection of life and limb; that when he went on the job in the fall of 1898, five months before, he had a worthless revolver, which

he threw away some time thereafter. The respondent offered to show by one Burnham that he, the respondent, had a revolver when he went on the job the fall before, to corroborate his own testimony, and to show that it was nothing new for him to have one, as bearing on the question of premeditation. It was not proper to corroborate his testimony, for having a worthless revolver without cartridges five months before was not relevant to his having procured a new serviceable one with cartridges the day before the homicide; no more so than to show he had a battle-ax or scimitar. His testimony in that respect being immaterial, corroboration of it was properly denied. The fact that he had a worthless revolver, which he threw away, did not tend to show it "was nothing new for him to have one," and for that purpose it was legitimately excluded. Had the testimony the tendency claimed for it by the respondent, the court excluded it upon the ground that it was too remote from the transaction. Questions of remoteness in such instances will not ordinarily be revised, but left to the trial court: *Dover v. Winchester*, 70 Vt. 418, 41 Atl. 445; *Stephen's Digest of Evidence*, 2d Am. ed., 6. There is no occasion to revise the question of remoteness in this case.

2. The prosecution claimed that the respondent purchased the revolver with the intent to use it upon Murphy. The respondent testified he purchased it as "a precautionary measure to protect himself against assault by Murphy and the colored man, or of anyone else." There was a colored man at work upon the job with Murphy and the respondent.

The respondent, for the purpose of showing that he did not buy the revolver particularly for Murphy, but for the general purpose of self-protection against the colored man as well as against Murphy and others, offered testimony, which was excluded ³⁹¹ under exception, tending to show that the colored man had told the respondent that he (the colored man) would lick the respondent. This was offered as bearing upon the intent with which he purchased the pistol. There was no offer to show the time when the threat of the colored man to lick him was made. It was relevant, if at all, only if made before the purchase of the revolver, and as there was no offer to show that it was before, there was no error in rejecting the testimony. Whether relevant or not we do not decide.

3. Two exceptions were taken to the testimony of Dr. Wheeler, a surgeon, who testified as a medical expert. The question put to him was a hypothetical one. He was directed:

to assume certain facts, which the testimony tended to show, and to consider such facts as were disclosed by the autopsy, which he himself had made, and also his observations at the autopsy, to all which he had testified, and was asked what in his opinion caused Murphy's death. His answer was, septic poisoning, the result of the wound.

A similar hypothetical question, if there was any other cause which contributed to his death, was put, and he answered in the negative.

(a) One objection made to the last question was that "it had not been submitted to the respondent's counsel for consideration before it was asked." The counsel contended they should have had an opportunity to examine the question in order to ascertain whether there were other objections to be urged against it. It does not appear from the record that there was any other objection than the one taken, hereinafter noted, nor that any other objection can now be made. Unless it is shown that there was an objection to the question that could have been taken, had the counsel had the opportunity to have inspected it, the respondent was not harmed by the denial of the claimed right to consider the question before it was asked. For this reason there was no error. But counsel have no legal right to examine a question before it is put. The party loses nothing ³⁹² by such a rule, for while no question can be made in this court that was not raised below, exception can be taken to any part of a question, or of the testimony contained in the answer, and if the exception is a valid one, the right of the party can thus be maintained.

Any other practice would tend to retard the progress of the trial, for much time might be spent over a question and the witness answer he knew nothing on the subject. Questions are often stated to the court so that the jury cannot hear them, and it is generally required in case the defendant's counsel ask that it be so done. But it is not a legal right, denial of which is error.

(b) The objection made to both questions was that they did not involve all the facts in the case and were lacking a portion of its clinical history. This was not a valid objection to the questions nor the answers. The opinion of an expert witness may be taken based upon a portion of the testimony in a case. The more testimony embraced in a hypothetical question the more valuable the testimony may be, depending upon the circumstances. But the testimony is legitimate, based upon

part of it. The cases often cited upon this point are: *Gilman v. Strafford*, 50 Vt. 723; *State v. Hayden*, 51 Vt. 296; *State v. Woodbury*, 67 Vt. 602, 32 Atl. 495. In *Gilman v. Strafford*, 50 Vt. 723, the question did not arise; *State v. Hayden*, 51 Vt. 297, was decided upon the authority of the *Gilman* case; and in *State v. Woodbury*, 67 Vt. 602, 32 Atl. 495, the question was correctly decided without the citation of authority.

4. Many exceptions were taken to the charge and have been argued by counsel. The respondent insists there was error in respect to what the court said upon the subject of the respondent's testimony in regard to his intention of shooting Murphy. In that part of the charge relating to murder in the first degree, the court properly charged with reference to the intention of the respondent in regard to the homicide of Murphy, and called the attention of the jurors to the fact that the respondent had testified he had no intent to kill Murphy before he went to the barn, and that he had no such intent when he was in the barn; that he had ~~so~~ testified to that, but had said nothing with reference to what intent he had after he went out of the barn. The jurors were told that if he had no intent to kill Murphy before he went out of the barn, there was time for him to form that determination between that time and the time of the shooting. And that if he did so form it after he went out of the barn, that it was, within the meaning of the law, premeditated.

It is insisted that the jury should have been told in this connection what the claim of the respondent was in respect to his intention after he had gone out of the barn. There was no error in the charge so far as the court went in disposing of that question, when speaking of the homicide, in respect to whether it was murder in the first degree or not. And what the counsel insist should have been said to the jury at this time was stated to the jury distinctly and accurately in that part of the charge in which it was material in respect to reducing the crime to manslaughter, whether it was premeditated or not, and whether he did form an intent after he went out of the barn to shoot him. They were told to consider all the evidence in respect to it in determining that question, and the jury were told that they must take into consideration all that the respondent said which bore upon his intention in regard to the shooting of Murphy, and that they should take it as they remembered it, and not as the court stated it to them, so that the respondent had the full benefit of the instruction in re-

spect to premeditation when the court charged upon the subject of manslaughter. The jury were told that if the shooting of Murphy was the result of the fear, fright, nervousness, or terror that seized the respondent, after he went out of the barn, it was manslaughter and not murder.

What the judge said was by way of comment in respect to a feature of the case which, if true, was quite significant. The question was, With what intent did the respondent shoot Murphy? He went on the stand as a witness, and, in response to questions of his counsel, said he had no intent to shoot Murphy when he went into the barn, nor when he was in the barn, but did not ⁸⁹⁴ testify what his intent was when he did go out of the barn. His failure to testify upon this point was a circumstance for the jury to consider, for if he had no intent to shoot him when he went out of the barn, it would have been very natural for him to have followed his denial of an intent to shoot him when he went into the barn, and when he was in the barn, with a like denial of an intent when he went out, and until the time of the shooting. From his failure to do so, the jury might properly infer he went out of the barn with the intent to shoot him. It is true his testimony tended to show that after he went out of the barn he was so frightened that he then shot him, but he did not say he had no such intent after he went out of the barn and prior to the shooting, although it might be inferred from what he did say. It was an argumentative way of stating that until he shot, when overcome with fear, he had no intent to kill Murphy. It is argued that as "the court gave an explanation of the respondent's evidence unfavorable to him, the court should also have given an explanation favorable to the respondent." This is not a just criticism of the charge. The court did not state the testimony in detail in any respect. The jury were told to consider the previous conduct of the respondent and Murphy toward each other, without stating what that conduct was; also what was said by the respondent to Murphy about settling the matter, or if Murphy spoke first, what was said about it—the manner in which each conducted himself, etc. The jury were told that the presumption was that the killing was without malice, and that that presumption, with the general presumption of innocence, was to be weighed in the respondent's favor, and must be overcome by the evidence of the state, and the killing must not be the result of some sudden heat of passion, etc. Upon this question of premeditation the court made no refer-

ence to the damaging character of the testimony of the respondent, save to the fact that he had not testified what his intent was when he went out of the barn, and this, we have said, was proper.

³⁹⁵ His claim was that he had no intent to shoot until he was so overcome with fear and terror that he feared immediate great bodily harm, etc., but the court made no reference in its charge to the most damaging features of the testimony—e. g., his statement to Murphy the day of the shooting that he (Murphy) had better try to do him, if he thought he could, thus placing the symbolical chip upon his shoulder and daring Murphy to knock it off; that “he would fire Murphy downstairs if he caught him in his room again”; that “he thought he could lick Murphy yet”; that “Murphy was no good”; and that “he had no sand in him”; that he met Murphy more than half way between the barn and the house and that when he shot him he said “I have got you now”; all this when the respondent was armed and Murphy was not—testimony that hardly tended to support the respondent’s theory that he was in great fear of Murphy—still none of this testimony was called specifically to the attention of the jury by the court. The explanation of the testimony by the court was as favorable to the respondent as unfavorable, and this exception of the respondent is not sustained.

It is further claimed that the court did not give due consideration to the testimony showing fright, fear, nervousness, and cowardice. The charge on the subject of manslaughter was full and accurate, and the court said to the jury that if the drawing of the revolver and the use of it was an afterthought subsequent to the encounter, wholly due to the then nervous excitement, fear, anger, and heat of blood of the respondent, the case would be one of manslaughter and not of murder, unless justifiable, in self-defense. But if such elements were without such provocation as the law regards as sufficient justification for anger and heat of blood, the killing would be murder and not manslaughter. That is, the charge placed the elements of fear, fright, nervousness, and cowardice on the same plane with anger and heat of blood. There is no other rule, and we fail to see wherein the trial judge erred in respect to the rule as applicable to a case of sudden fright, fear, terror, and nervousness. The jury were ³⁹⁶ plainly told that if the drawing and use of the revolver was an afterthought subsequent to the encounter and wholly due to the then nervousness,

excitement, fear, anger, and heat of blood of the respondent, the offense was manslaughter and not murder. If, as the respondent's testimony tended to show, he went into the barn for safety, thinking Murphy would go away, when he saw Murphy removing his outer garments and start toward him, and he judged from his (Murphy's) hostile attitude that he intended him (the respondent) great bodily harm, and he then, through fear, nervousness, excitement, fright, etc., shot Murphy, it reasonably appearing that it seemed to him he could defend himself in no other way, the circumstances would present a case of justifiable homicide, one of self-defense. It is argued that when the respondent saw Murphy going toward him, and apprehending he would do him great bodily harm, he was seized with fear, terror, excitement, fright, and nervousness, and that he then shot Murphy. Such facts presented a case of self-defense, and required appropriate instructions upon that subject, and it will be seen by reference to the charge that the instructions were full, adequate, and complete in that respect, and of such a character that of them the respondent does not complain. It is claimed by the respondent that he had no design to kill Murphy, but that when he went out of the barn he was confronted by the deceased, and so overcome with fear, nervousness, fright, and terror that, as a result, he shot Murphy in self-defense, and the counsel argue that on this theory the respondent had a right to do what was necessary to make his defense effective, and although it might not have been necessary to have killed Murphy, if in view of his fear, fright, nervousness, or cowardice, it reasonably seemed so to him, he could not be convicted of murder. Many cases were cited upon this question, namely, *State v. Carr*, 53 Vt. 37, *Grainger v. State*, 5 Yerg. 459, 26 Am. Dec. 278, and many citations from the text-books. The gist of the rule in respect to this matter is well stated in all of the cases so far as we observe. It is not whether the necessity actually ³⁹⁷ existed, but whether in fact it reasonably seemed so to the respondent, under all the circumstances of the case, and the rule was properly stated by the trial judge in the respect mentioned, for the court said that: "If the circumstances were such as reasonably to lead the respondent to think that he was in danger of being killed or of great bodily harm by an assault from Murphy, he had a right to defend himself, etc." And later the jury were told that: "The amount of force that he [the respondent] had a right to use depended to some extent upon the peril that he had reason

to believe he was in at the time. . . . He had to judge of the danger he was in from the circumstances that surrounded him, and if it reasonably appeared to him under all the circumstances that he could protect himself in no other way except by killing Murphy, and if then Murphy started to kill him or do him great bodily harm, he would have a right to defend himself under the circumstances in that way." This question was stated accurately and fully by the trial judge, and the claimed error is that the jury were not told that the crime of manslaughter was distinct from murder, so that the jury might have understood that if the defendant was in fault at all in acting unreasonably under the circumstances, the jury should find him guilty of murder when they should properly find him guilty of manslaughter only, and that this injustice arose from the failure of the court to state the question consistently with the theory of manslaughter—the lesser crime. But the theory of the case as claimed by the respondent in respect to manslaughter had already been fully stated by the trial judge, and it is not probable the jury could get a wrong conception of the rules in respect to the several degrees of crime when they were so accurately and fairly stated by the court. The respondent had the benefit of having the testimony considered under a full knowledge of the law as to the essential characteristics of each kind and degree of crime with which the respondent was charged under the indictment. The court did not state that the respondent could not be convicted of manslaughter nor of anything less than murder. This ³⁹⁸ assumption of what the court stated is not correct. The court left the jury to consider whether the offense was murder in the first or second degree, manslaughter, or justifiable homicide. The fact is, these questions were all presented to the jury, and the question of self-defense was fully and fairly stated to them. Two full pages of the printed case contain nothing but the instructions in regard to whether the homicide was justifiable, whether the killing was in self-defense, and, so far as we can see, it accurately, fairly, and fully met every phase of the case. The criticisms of counsel taken in their brief in respect to the large place it almost wholly upon the ground that the jury might have misunderstood facts in reference to the transaction and the law as applicable thereto. For instance, it is argued that from the language of the charge the jury might well understand that the respondent was not justified under any circumstances in going out of the barn. It is clear that one is

not warranted in taking this view of the case. No jury could have that impression from the whole of the charge nor from any part of it. They were at liberty to find from the language of the instructions that if the respondent was at fault in coming out of the barn, but that the shooting resulted from fear, fright, terror, and nervousness, or his seeming situation as it reasonably appeared to him at the time, he was not guilty of murder, in either degree, and it is fair to say that the jury must have followed these instructions. The instruction given the jury in respect to the offense, if the affray was entered upon by the respondent under such circumstances that the killing would be murder, fully protected him in respect to any change in his situation during the affray, by permitting the jury to determine that if his design in respect to the affray altered, it became merely a case of manslaughter or self-defense; the respondent had the benefit of it, and the court did not err in that respect. The court charged that: "Though the right to take life in self-defense is unquestionable, one on whom another, unarmed, is making mere threats and going toward in his ordinary manner of walking must not instantly shoot him, and if he ~~so~~ does thus needlessly kill the other who, unarmed, is only making threats and thus going toward him, it would be murder." Claim is not made that this is an erroneous instruction, but it is insisted that the jury should have had an opportunity to judge for themselves whether the acts of Murphy amounted to an overt act or hostile demonstration. The court did not take from the jury the right to determine the nature and character of the acts of Murphy, whether overt or not, nor did the court state that there was no overt act of injuring the respondent on the part of Murphy, for in one part of the charge the court stated the case saying that: "If the jury find that Murphy went along behind in his usual way of walking, without any overt act of injuring the respondent, excepting taking off his coat and going toward the barn, and that when about half way between the house and barn he did or did not stop when spoken to by Mr. Pixley, and told not to go into the barn for he would get hurt, the respondent would have no right to rush out of the barn revolver in hand, draw near to Murphy, and then and there kill him, unless the circumstances were such as to reasonably lead the respondent to think that Murphy was about to kill him or do him great bodily harm, and that the respondent could protect himself in no other way." The statement of this rule was correct and such as required by the testimony in the case.

There is no statement on the part of the court that there was no overt act on the part of Murphy to injure the respondent. Whether there was any overt act on the part of Murphy to injure the respondent was expressly left to the jury. This is shown by the following abstract from the charge:

"It is claimed on behalf of the respondent that the taking off his coat by Murphy and going toward the respondent at the barn, as the evidence tends to show, was such an overt act as to create in the mind of the respondent a hostile demonstration by Murphy of such a character as to impress upon him the imminence of danger of loss of his life or of great bodily harm. You will take into consideration all the evidence bearing thereon, and ⁴⁰⁰ say whether what Murphy then and there did was such an overt act as to reasonably impress the respondent in that way, and if it was, you will consider such threats as evidence bearing upon the question of self-defense, and give the evidence such weight as you deem it entitled to. But if you find that what Murphy then did was not such an overt act, then such prior threats made by Murphy would have no force in favor of the respondent in support of his plea of self-defense."

That the question of overt acts on the part of Murphy was left to the jury is also seen from the very close of the charge—the last thing said to them, viz.:

"In referring to what took place when the respondent and Murphy went on the piazza, and, in substance, agreeing to go out and settle the matter, or had a talk about it, I stated one or both of them took off their coat or outside jacket. It is suggested that the evidence tends to show that Murphy took off his coat and sweater. Well, you will remember the evidence, gentlemen, and in that regard you will take it as you remember it. And you will take into consideration, at the same time, the actions of Murphy, so far as they were perceptible to—seen by—the respondent, in determining whether there was an overt act within the definition that I have given you, a demonstration of that nature on the part of Murphy toward the respondent."

The testimony tended to show that Murphy took off his coat and sweater and started toward the barn after he and the respondent had agreed to settle the difficulty between them by fighting, and the court stated all the facts in reference to Murphy's conduct which the testimony tended to show. The claim that the jury should have been told that "if the assaulting

parties talked together before the homicide was commenced, and one gave notice of his desire to withdraw from the combat, and really and in good faith endeavored to decline any further struggle, and the homicide was necessary to save him from great bodily harm, it might be excusable," was not required under the state of the testimony, for there was nothing in the testimony ⁴⁰¹ that indicated or tended to show any desire on the part of the respondent to withdraw from the combat, and that he had really and in good faith declined any further struggle, but the testimony tended to show the reverse. It was an abstract question and the court was not required to give any instructions upon it.

There are two further objections made to the charge; one is to the language in regard to the case of mutual combat, where the court said: "That it was not important to the character of the killing in cases of mutual combat which party gives the first blow." This was favorable to the respondent, inasmuch as it gave the jury liberty to acquit him although he gave the first blow; and the court had a right to state the rule that if a man draw his sword before the other has attempted to draw his and thrust his antagonist through the body, whereby he dies, it is murder, for it shows the purpose of killing in the first instance. This instruction was peculiarly proper. The testimony tended to show that Murphy was unarmed, that the respondent was armed, and it is evident that the respondent knew that Murphy was not armed, that they had agreed to go to the barn or the vicinity and settle the matter, as they phrased it, in an encounter. This being so, and before they had any opportunity to engage in mutual combat, without anything on the part of the respondent to show that he intended to retire from the combat, if he with his firearm, knowing that Murphy had none, shot him through the body, whereby he died, it was murder, for it showed the purpose of killing in the first instance. This instruction was required, and although there might have been in the case other elements which characterized the shooting, the jury had no right to understand that these other elements had nothing to do with the degree of criminality of the shooting. The jury may have found there were no other elements in regard to it, but simply the fact that the respondent armed himself, knowing that the deceased was unarmed, and then at the very first point of the encounter shot him. This would require the instruction ⁴⁰² given. Neither was it error not to state the questions of superior strength and health of one and disease

and weakness of the other in that part of the charge which referred to the use of the revolver by the respondent. There were no instructions given to the jury in regard to the testimony which were erroneous. The testimony in the case required full and accurate instructions in regard to the character of all degrees of the crime—murder of both degrees, manslaughter, and justifiable homicide—and the court fully complied with all these requirements, and we are unable to find error in any part of the charge.

Upon inspection of the record the court are of opinion that judgment ought to be rendered upon the verdict, and it is so rendered and sentence and execution thereof ordered.

5. The respondent has brought a petition for a new trial, upon the ground that since the former trial he has discovered testimony to show that he was not guilty by reason of insanity. He supports his petition by the depositions of nine witnesses, who appear to be reputable persons, many of them town officers, residing in South Berwick, Maine, and that vicinity. The substance of all the depositions is that the respondent was odd, peculiar, not talkative; that at times he would be suspicious, imagining there were parties ready, as one witness phrased it, "to do him up," morose, and sullen, but was not vicious, while at other times he would be talkative, companionable, genial, and cheerful. Testimony tends to show that at times he was somewhat troubled from having become a Congregationalist, or attended the Congregational church, when he was formerly a Catholic. The testimony tends to show that he complained of having been wrongfully listed in South Berwick, but at the time he made the complaints in respect thereto, he was drunk, and there is nothing in the testimony tending to show that he was not wrongfully listed there. One witness says that he would only say "Hello" when persons spoke to him. This is the substance of the testimony which it is claimed has been newly discovered. One witness says that he was satisfied in his own mind that the respondent ⁴⁰⁸ was not right mentally; another one, that he thinks the respondent must have been insane to shoot anyone, while two pronounce him insane in their opinion. One says that he is not capable of judging whether Doherty was sane or insane; one says that he cannot call him insane, and three of the witnesses state that the thought that he was insane never occurred to them at the time when they were noticing his oddities and peculiarities.

It is hardly necessary to speak of the question whether the respondent or his counsel were in fault or negligent in not making the discovery of this testimony before the trial, for the reason that the testimony, taken as a whole, does not convince us that a different result would be reached upon a new trial. We have scanned it very carefully. We do not require it to be of such a character that it would convince a jury, by any rule of evidence, that the respondent was insane. But it must be of sufficient force, taken in connection with all the rest of the testimony in the case, to generate or create a doubt in the mind of the jurors of the party's guilt. The burden is not upon him to establish his insanity, but if the testimony that it is claimed has been newly discovered is of such a character as to leave a reasonable doubt of the respondent's guilt when taken in connection with all the rest of the testimony, it would be sufficient, and we should grant him a new trial. But the character of it is such that we do not take this view of it, and are of opinion that in case of another trial the result would be the same as the last.

The petition is, therefore, dismissed.

AN EXPERT WITNESS MAY BE ASKED HIS OPINION based on a particular portion, though not the whole, of the testimony, the truth of which is assumed: *Yardley v. Cuthbertson*, 108 Pa. St. 395, 56 Am. Rep. 218, 1 Atl. 765.

HOMICIDE—SELF-DEFENSE.—The danger that will justify the exercise of the right of self-defense need be only apparent. The question is, Did the accused, under all the circumstances of the case, honestly believe that he was in danger of his life, or great bodily harm, and that it was necessary for him to do what he did in order to save himself from such apparent or threatened danger? See the monographic note to *State v. Sumner*, 74 Am. St. Rep. 712, 723, on the law of self-defense. The relative strength of the parties as entering into the question of self-defense, is discussed in *Peragi v. State*, 104 Wis. 230, 76 Am. St. Rep. 865, 80 N. W. 593; *Commonwealth v. Barnacle*, 134 Mass. 215, 45 Am. Rep. 819; *Stephenson v. State*, 110 Ind. 858, 59 Am. Rep. 216, 11 N. E. 860.

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2. ABATEMENT.—A PLEA IN ABATEMENT COMES TOO LATE when it is not filed until the case has been brought into a circuit court by appeal from a justice’s court. (Blankenship v. Blackwell, 175.)

3. ABATEMENT OF ACTIONS—STATE AND NATIONAL COURTS.—The pendency of an action in a national court held for the same state and within the same territory, may be pleaded in abatement of a subsequent action between the same parties commenced in a state court for the same subject matter and seeking the same kind of relief. In such case the jurisdiction of the two courts is domestic, and not foreign to each other. (Wilson v. Milliken, 578.)

4. ABATEMENT OF ACTIONS—DISMISSAL OF FORMER SUIT PENDENTE LITE.—The objection of a former suit pending is removed by its dismissal or discontinuance, even after plea in abatement in a second suit, unless the latter is brought for vexatious purposes. (Wilson v. Milliken, 578.)

ACCOMPLICES.

See House of Ill-fame, 1.

ACCOUNT-BOOKS.

See Evidence, 19-23.

ACKNOWLEDGMENTS.

1. CONVEYANCES — ACKNOWLEDGMENT — CONCLUSIVE-NESS.—A proper certificate of acknowledgment to a conveyance is conclusive as to the facts stated therein, except upon proof of fraud or imposition in the procurement of the acknowledgment or conveyance. (Hayes v. Southern Home etc. Assn., 216.)

2. ACKNOWLEDGMENT—CERTIFICATE OF—INTERESTED PARTY CANNOT TAKE.—Public policy forbids that the taking and certifying the acknowledgment of a conveyance shall be exercised by an officer who is financially interested in the conveyance. (Hayes v. Southern Home etc. Assn., 216.)

3. ACKNOWLEDGMENT OF WIFE—CONVEYANCE OF HOMESTEAD—SEPARATE EXAMINATION.—Upon the alienation of a homestead, the separate examination of the wife and her acknowledgment are essential to the operation of the conveyance. (Hayes v. Southern Home etc. Assn., 216.)

4. CONVEYANCES—ACKNOWLEDGMENT AND SEPARATE EXAMINATION OF WIFE—DISQUALIFICATION.—A stockholder in an association has a substantial interest in upholding a mortgage executed to it, and is, therefore, disqualified from conducting or certifying the separate examination and acknowledgment of a wife, where such mortgage is given upon a homestead. (*Hayes v. Southern Home etc. Assn.*, 216.)

5. CONVEYANCES — ACKNOWLEDGMENT OF WIFE — WAIVER OF INCOMPETENCY TO CONDUCT SEPARATE EXAMINATION.—A married woman has no power to waive incompetency on the part of the officer taking her separate examination required in the alienation of a homestead. (*Hayes v. Southern Home etc. Assn.*, 216.)

ACTIONS.

1. ACTION — FORM OF — TORT OR CONTRACT.—Where from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action. (*Holden v. Rutland R. R. Co.*, 926.)

2. CAUSE OF ACTION—WHEN NOT ARISE—DEPRECIATION DURING LITIGATION.—Where the delays of litigation have caused a loss by the depreciation in the market value of the stock for the recovery of which suit has been brought, such loss is a hazard or an indirect result of the litigation, and does not give rise to a new or separate cause of action. (*Bracken v. Atlantic Trust Co.*, 731.)

3. CAUSE OF ACTION—DEPRECIATION PENDING APPEAL.—Where the depreciation in the value of stock sued for occurs after judgment has been rendered and pending the appeal of the defendant, there is no new or illegal detention of the stock which will give rise to a new cause of action, but there is simply a continuation of the original wrong which was sued upon, especially where the plaintiff took no steps to enforce his judgment. (*Bracken v. Atlantic Trust Co.*, 731.)

See Railroads, 3.

ADOPTION

1. ADOPTION—REQUISITES OF.—Another's child cannot be adopted except pursuant to the decree of a competent court, made in conformity with the statute. (*Non-she-po v. Wa-win-ta*, 749.)

2. ADOPTION — INDIANS — CUSTOM.—The custom of Indians, which makes one caring for an abandoned child its adopted parent, and gives to it all the rights and privileges of a natural child, does not amount to an adoption. (*Non-she-po v. Wa-win-ta*, 749.)

3. ADOPTION — NATURE OF PROCEEDINGS.—Proceedings for the adoption of a minor are not judicial, and the order of a judge therein is not the judgment of a court, but a superior judge designated by the code to hear and determine such proceedings exercises judicial functions. (*Estate of Camp*, 371.)

4. ADOPTION—ABANDONMENT AS A JURISDICTIONAL FACT—COLLATERAL ATTACK UPON ORDER OF COURT.—Whether children have been abandoned by their parents is a jurisdictional fact to be determined by the judge upon the evidence pre-

presented to him, before he is authorized to entertain a petition for their adoption. A recital in his order that it appears to his satisfaction that they have been so abandoned is a determination of this fact which cannot be questioned in a collateral attack upon the order. (Estate of Camp, 371.)

5. **ADOPTION—CONTEST OF, ON APPLICATION FOR LETTERS OF ADMINISTRATION—INADMISSIBLE EVIDENCE.**—Upon an application for letters of administration upon the estate of an adopting father of minor children, where the adoption proceedings, including the order of the judge sanctioning the adoption, are read in evidence, a brother of the deceased will not be allowed to introduce evidence showing that, at the time of the proceedings, the children had not in fact been abandoned by their parents. (Estate of Camp, 371.)

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION—TITLE TO SUPPORT.**—If a husband, who is a joint grantee with his wife, returns a deed to his grantor, and procures a new one executed to her alone, under which she takes possession and claims title, the second deed purporting to convey the fee, although it passes no additional title to the wife, constitutes good color of title on which to base adverse possession. (Poindexter v. Rawlings, 869.)

2. **ADVERSE POSSESSION—TITLE BY—DEVESTMENT OF.**—If a person has acquired title to land by adverse possession, no abandonment by him of such possession, nor any other act short of a conveyance by him, can divest him of such title. It cannot be divested by any subsequent legislative enactment, and the law existing prior thereto and at the time of the ripening of the adverse possession into a perfect title is the law which must govern the case. (Tennessee etc. R. R. Co. v. Linn, 108.)

3. **ADVERSE POSSESSION OF SCHOOL LANDS** for ten years prior to the enactment of a statute exempting all school land from the operation of a ten year statute of limitation is sufficient to create a perfect title, as against the holder of a patent to such lands from township officers. (Tennessee etc. R. R. Co. v. Linn, 108.)

4. **ADVERSE POSSESSION UNDER PAROL CONTRACT OF SALE—EXTENT OF.**—The adverse possession of one entering and holding under an oral contract of sale after he has paid the purchase money is limited to the lands in his actual possession, and does not extend beyond that to the boundaries of the lands fixed by his contract, as it would if he held under written color of title. (Tennessee etc. R. R. Co. v. Linn, 108.)

5. **LIMITATION OF ACTIONS—REMAINDERMEN.**—The statute of limitations does not run against remaindermen until the termination of the life estate. (Sutton v. Clark, 848.)

6. **ADVERSE POSSESSION AS AFFIRMATIVE DEFENSE.**—Title to land by adverse possession may be affirmatively set up by defendant under a general denial of plaintiff's title. (Sutton v. Clark, 848.)

7. **LIMITATION OF ACTIONS—LIFE TENANT—REMAINDERMEN.**—If the statute of limitations begins to run against a person in his lifetime, his death and devise of the land for the life of another, with remainder over, does not arrest the running of the statute in favor of the remainderman unless there is a new trespass during the holding of the tenant for life. (Sutton v. Clark, 848.)

8. ADVERSE POSSESSION—PRESUMPTION OF GRANT-TACKING.—A defendant, under a general denial, may prove that he solely, or in connection with others, has been in the possession of the land in dispute long enough to presume a grant, and in making up such adverse possession may tack his possession to those through whom he claims. (*Sutton v. Clark*, 848.)

9. PRESCRIPTION AGAINST THE UNITED STATES—TAILINGS, RIGHT TO DEPOSIT.—No use of premises, however long continued, can be adverse to the United States. Hence, a miner cannot, by depositing the tailings of a mining claim upon the public domain for any length of time, thereby acquire a right to do so. (*Miser v. O'Shea*, 751.)

AGENCY.

AGENT ACTING FOR BOTH PARTIES.—Where a plaintiff becomes a purchaser from the defendant through an agent, who, without the plaintiff's knowledge, acts also as the agent of the defendant, equity will avoid the transaction without reference to any actual fraud on the part of the defendant or of the agent, there being such fraud in law as to make the contract a voidable one at the election of the plaintiff. (*Carr v. National Bank etc. Co.*, 725.)

See Banks and Banking, 3-8; Trusts, 4.

ALTERATION OF INSTRUMENTS.

See Deeds, 9-11.

APPEAL.

1. APPELLATE PRACTICE.—EXCEPTIONS, TO BE CONSIDERED on appeal, must contain a statement of the specific errors or omissions complained of. (*Nohrden v. Northeastern R. R. Co.*, 826.)

2. APPEAL—WAIVER.—ASSIGNMENTS OF ERROR which counsel do not insist upon in argument before an appellate court may be treated as waived. (*Arnold v. Arnold*, 199.)

3. APPEAL—WAIVER.—ASSIGNMENTS OF ERROR which counsel do not insist upon in argument before an appellate court may be treated as waived. (*Ward v. Hood*, 205.)

4. APPEAL—ASSIGNMENTS OF ERROR—WHEN NOT INSISTED UPON.—A mere repetition of an assignment of error, in the brief of counsel, will not be considered by an appellate court as an "insistence in argument." (*Ward v. Hood*, 205.)

5. APPEAL AND WRIT OF REVIEW, CONCURRENT PROSECUTION OF.—As a writ of review is made concurrent with the right of appeal, an appeal from the assessment of damages in a proceeding for opening a public road does not waive the right to have the regularity of the proceeding to lay out and establish the road reviewed at the same time, on a writ of review. (*Fanning v. Gilliland*, 758.)

6. JURISDICTION—QUESTION OF, MAY BE HEARD, WHEN.—The question of jurisdiction may be for the first time raised in the supreme court. (*Fanning v. Gilliland*, 758.)

7. APPEAL—POINT FIRST RAISED ON—MISJOINDER—ELECTION.—An objection that there is a misjoinder of parties or of causes of action, or that the plaintiff has elected to pursue a

particular remedy, cannot be raised for the first time on appeal. (Easton v. Somerville, 502.)

8. APPEAL—OBJECTION FIRST RAISED ON.—The objection that a suit is not properly brought should be raised by motion or demurrer, and cannot be first raised on appeal. (Easton v. Somerville, 502.)

9. APPEAL FROM JUDGMENT WHICH HAS BEEN PAID. A party against whom a judgment has been rendered is not prevented from appealing by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal, and his appeal will not be dismissed because of such payment. (Warner Bros. Co. v. Freud, 400.)

10. APPEAL—RESTITUTION UPON REVERSAL—RELEASE OF ERRORS.—AS PAYMENT OF A JUDGMENT must be regarded as a matter of compulsion, it does not release errors, and the parties will be restored to their rights where the judgment is reversed upon appeal. (Warner Bros. Co. v. Freud, 400.)

11. APPEAL FROM JUDGMENT AGAINST ADMINISTRATRIX PAID BY HER.—If a judgment against an administratrix and other devisees directs her to pay the same within sixty days or forfeit her interest in certain land to the plaintiff, who was a successor of a devisee, and who had redeemed from a sale made under the foreclosure of a mortgage executed by the decedent, and she does pay it, she does not thereby lose her right of appeal, where there was no compromise, no concession by the respondent, and no condition imposed or assurance given that the appeal would not be prosecuted. Such payment is not only prudent, but may well be regarded as compulsory. (Warner Bros. Co. v. Freud, 400.)

12. ESTOPPEL—PAYMENT OF JUDGMENT—DISMISSAL OF APPEAL.—If an administratrix pays a judgment against her, but the plaintiff refuses to give a receipt except as for so much money paid by her, without referring to the judgment, he is estopped from saying, for the purpose of dismissing her appeal, that the judgment has been satisfied, and that, for that reason, the appeal should be dismissed. He cannot for one purpose refuse to acknowledge satisfaction of the judgment, and for another purpose insist that it is satisfied. (Warner Bros. Co. v. Freud, 400.)

13. APPELLATE PRACTICE—INSTRUCTIONS.—The trial judge in charging the jury upon the issues raised by the pleadings, need not charge except upon such issues, and if he fails to state any of such issues it is incumbent upon the party desiring to make this a ground of appeal to have called attention to the omission at the time; otherwise he cannot complain of instructions given. (Sutton v. Clark, 848.)

14. APPELLATE PRACTICE ON OVERRULING FORMER DECISION—REMAND FOR AMENDMENT OF PLEADING.—The supreme court may remand a case for the amendment of the pleadings, if it appears that a party has followed and been misled in making up issues by a former opinion of the court, which is overruled in the case at issue. (Sulley v. Childress, 875.)

15. APPEAL—FINDINGS OF FACT WILL BE ALLOWED TO STAND, WHEN.—If a jury has been waived, findings of fact dependent upon the credibility of oral testimony will, on appeal, be allowed to stand unless the evidence as a whole would justify the setting aside of a verdict. (Jones v. Chenault, 211.)

16. APPEAL—EXCESSIVE VERDICT—SETTING ASIDE. The action of a trial court in overruling a motion to set aside a

verdict on the ground that the damages are excessive is not revisable on appeal. (Sartwell v. Sowles, 943.)

17. APPEAL.—THE GRANTING OF A CERTIFIED EXECUTION rests largely in the discretion of the trial court upon the facts found by it, and is not revisable on appeal. (Sartwell v. Sowles, 943.)

ARBITRATION.

ARBITRATION—REVOCATION OF SUBMISSION.—A submission to arbitration may be revoked by either party, at any time before an award is made and published, notwithstanding an agreement not to revoke, and when the submission is revoked it is no bar to a subsequent action. (Sartwell v. Sowles, 943.)

ARSON.

1. ARSON—EVIDENCE.—An opinion expressed by a husband to his wife that a third person was a barn-burner is inadmissible upon a trial of such third person for arson. (Pedigo v. Commonwealth, 566.)

2. ARSON.—EVIDENCE that just prior to the discovery of a fire the witness loaned matches to a certain person is inadmissible in a trial for arson, if it is not shown that the defendant was in the company of the person borrowing the matches, and no conspiracy is charged in the indictment. (Pedigo v. Commonwealth, 566.)

ASSAULT.

ASSAULT WITH INTENT TO KILL—ABANDONMENT OF CHILD.—If a parent having charge of an infant of tender years abandons and exposes it to the inclemency of the weather, thereby intending to accomplish the death of the child, such parent is guilty of an assault with intent to kill. (Pallis v. State, 106.)

ASSISTANCE, WRIT OF.

See Receivers.

ASSUMPSIT.

ASSUMPSIT.—AN ACTION FOR MONEY HAD AND RECEIVED lies wherever one has received or holds money which ex a quo et bono belongs to another. (Ward v. Hood, 205.)

ATTACHMENT AND GARNISHMENT.

1. ATTACHMENT—NATURE.—The remedy by attachment partakes essentially of the nature and character of a proceeding in personam, and not of a proceeding in rem, and while an attachment against a nonresident defendant who makes no personal appearance is more in the nature of a proceeding in rem, any judgment rendered must ascertain and declare the amount of the debt, claim, or demand sought to be enforced by the attachment, and this must be in the same mode and form as if the suit were in personam. (Pullman Palace Car Co. v. Harrison, 68.)

2. ATTACHMENT—A STATUTORY REMEDY—STRICT CONSTRUCTION.—The remedy by attachment was unknown to the common law, and derives its existence solely from statute, and because of its harsh and extraordinary character, courts are inclined to construe such a statute strictly in favor of those against whom it may be employed. (Pullman Palace Car Co. v. Harrison, 68.)

3. **ATTACHMENT UPON LAND—WHEN VALID.**—The levy of an attachment upon real estate, to be valid, must be evidenced by a return of service of the writ, signed by the officer. (*Schoonover v. Osborne*, 496.)

4. **ATTACHMENT UPON LAND—NECESSITY OF NOTICE.**—Notice of an attachment upon land is not necessary to render the attachment valid, but is required only to complete the levy, and the levy is effectual if the notice is given within a reasonable time. (*Schoonover v. Osborne*, 496.)

5. **ATTACHMENT UPON LAND—MORTGAGE—PRIORITIES.** Where the fact of making the levy of an attachment upon land is indorsed on the writ of attachment, but notice thereof is not given to the defendant until a reasonable time thereafter, the lien of the attachment accrues at the date of the indorsement, and is superior to the lien of a mortgage upon the same land given by the defendant subsequently to the attachment but before notice thereof is given. (*Schoonover v. Osborne*, 496.)

6. **ATTACHMENTS—PRIORITY.**—If writs of attachment are placed in the hands of different officers to be levied, the one first levied upon the defendant's personalty acquires priority. (*Arkadelphia Lumber Co. v. McNutt*, 299.)

7. **ATTACHMENT—PRIORITY.—THE LEVY OF A SPECIFIC ATTACHMENT** upon personalty for the purchase price thereof does not create a lien superior to that created by a prior levy of a general attachment on the same property. (*Arkadelphia Lumber Co. v. McNutt*, 299.)

8. **GARNISHMENT.—THE IMMATURE CLAIMS** of indebtedness accruing to a defendant, which may be subjected to garnishment, are those which spring from contracts in existence when the lien of the garnishment process attaches. (*Henry v. McNamara*, 183.)

9. **GARNISHMENT.—A CONTRACT OF EMPLOYMENT** which, by its terms, makes its continuance at all times dependent upon the will of either party, is no evidence of a future indebtedness subject to garnishment. (*Henry v. McNamara*, 183.)

10. **GARNISHMENT—PAYMENT IN ADVANCE FOR SERVICES—OVERDRAWING.**—If an employer is garnished for an indebtedness due his employé, and his answer of no indebtedness is contested, but it appears that he allowed his employé to overdraw his wages by way of payment in advance for his services, the garnishee is entitled to avail himself of such overdrafts to extinguish, *pro tanto*, his liability to the employé without pleading or claiming them as a setoff. (*Henry v. McNamara*, 183.)

11. **GARNISHMENT—DEBTS ACCRUING BETWEEN TWO ANSWERS.**—If a garnishee makes one answer in a justice's court, and another on appeal in the circuit court, his second answer, denying a present indebtedness does not raise an issue as to debts accruing between the filing of the two answers and not owing at the time of the last. (*Henry v. McNamara*, 183.)

12. **GARNISHMENT—INSTRUCTIONS.**—When a garnishee, on appeal from a justice's court, files a second answer, denying a present indebtedness, it is not error, upon a contest of the answer, to refuse charges which ignore the principle that such answer does not raise an issue as to debts accruing between the two answers, and not owing at the time of the last, and which do not confine their propositions relating to the effect of payments to such payments as were made on indebtedness covered by the garnishment. Such charges would be misleading. (*Henry v. McNamara*, 183.)

13. GARNISHMENT AGAINST FRAUDULENT ATTACHMENT.—A judgment creditor may by garnishment subject to the payment of his debt money in the hands of an officer as the proceeds of a sale of the debtor's property under an attachment sued out by another creditor in fraudulent collusion with the common debtor. In such garnishment proceeding evidence that such attachment proceedings were fraudulent is admissible. (*Stern v. Butler*, 146.)

14. ATTACHMENT—WHEN FRAUDULENT.—If a person, in collusion with an insolvent debtor, sues out a writ of attachment, obtains judgment in pursuance of their collusive agreement in which is condemned the effects of such debtor to the payment of the collusive debt, this is a fraud upon other creditors of such debtor, and such judgment cannot be enforced. (*Stern v. Butler*, 146.)

15. GARNISHMENT—PERSONAL JUDGMENT WITHOUT PERSONAL SERVICE.—Service of a writ of garnishment issued in aid of a pending suit does not confer jurisdiction of the defendant therein, without personal service upon or appearance by him, so as to authorize personal judgment against him. (*Southern Ry. Co. v. Ward*, 129.)

16. GARNISHMENT—PERSONAL JUDGMENT WITHOUT PERSONAL SERVICE.—A judgment against a garnishee based upon a personal judgment rendered against a nonresident defendant without personal service upon or appearance by the latter, is void, and is no protection to such garnishee against a subsequent garnishment for the same fund. (*Southern Ry. Co. v. Ward*, 129.)

17. TRUSTEE PROCESS—DEBT PAYABLE OUTSIDE OF STATE.—A resident trustee is chargeable upon a debt payable to a nonresident in the state of his domicile. (*Hawley v. Hurd*, 922.)

18. GARNISHMENT—NEGOTIABLE PAPER—TRANSFER TO BANK WITHOUT THE STATE.—Under a general statute providing that negotiable paper may be attached by trustee process before notice of transfer, but which exempts such paper from attachment when transferred to banks in the state, negotiable paper transferred to a bank without the state may be attached by trustee process before notice of transfer, and such discrimination is not unconstitutional. (*Hawley v. Hurd*, 922.)

19. TRUSTEE—DEFENSE.—A trustee can defend upon the ground of rights acquired by an assignee who does not appear. (*Hawley v. Hurd*, 922.)

20. GARNISHMENT reaches only such demands as the defendant debtor could, in his own name, recover in an action of debt or indebitatus assumpsit. (*Skewes v. Tennessee etc. R. R. Co.*, 214.)

21. GARNISHMENT.—THE WAGES OF A CITY EMPLOYEE engaged in administering the affairs of the municipality, are, on grounds of public policy, exempt from the process of garnishment. (*Skewes v. Tennessee etc. R. R. Co.*, 214.)

22. ATTACHMENT—GARNISHMENT—WAGES OF SANITARY INSPECTOR—EXEMPTION OF.—When a person is employed by a city to do its sanitary work, and is to be paid for his services a stated per cent of the proceeds arising from such services, when collected by an officer to be appointed by the city for that purpose, he is an employé of the city, engaged in administering its affairs. Hence, if a company has collected from its employés certain sanitary charges, payable to such officer, the fund is not subject to garnishment in the company's hands at the suit of a creditor of such employé. (*Skewes v. Tennessee etc. R. R. Co.*, 214.)

See Corporations, 9.

AUCTION.

See Sales, 12.

BAILMENTS.

1. BAILMENTS—NEGLIGENCE—BURDEN OF PROOF.—If goods which are the subject of a bailment are lost, the burden of proof of negligence is on the bailor. Proof merely of the loss is not sufficient to put the bailee on his defense, and shift the burden of proof. (James v. Orrell, 293.)

2. BAILMENTS—CONDITIONAL SALE.—A lease of personal property for a term of years, in consideration of a fixed sum, to be paid in monthly installments, containing an agreement, in case of no default, to execute a bill of sale of the property, constitutes the agreement a bailment, and not a conditional sale. (Lippincott v. Scott, 801.)

BANKS AND BANKING.

1. BANKS AND BANKING—CHECKS—PAYMENT.—If the holder of a check delivers it to a bank for collection, which sends the check by mail to the drawee, who, upon its receipt, having money on deposit to the credit of the drawer, indorses the check "paid," and afterward delivers it to the drawer, the check is deemed paid as between the holder and the drawer, even if the bailee bank, instead of receiving cash, takes exchange which turns out to be worthless. In such case the loss which the holder thereby sustains is regarded as the result of his own negligence or that of the bank holding the check for collection. This rule is not affected by any usage or custom where such methods of collection obtain. (O'Leary v. Abeles, 291.)

2. BANKS AND BANKING—CHECKS SENT FOR COLLECTION—INSOLVENCY OF BANK—LIABILITY OF DIRECTOR.—If the payee of a check delivers it to a bank for collection, and that bank sends the check to the drawee bank, which, having funds to the drawer's credit, indorses the check "paid," and sends a draft to the collection bank for the amount, surrendering the check to the drawer, the check must be deemed to have been paid as between the drawer and the payee, though such draft proves to be worthless, and the drawee bank subsequently fails, and the fact that the drawer of the check is a director in the drawee bank does not render him liable for the resulting loss, provided he has acted in good faith with his creditor the payee of the check. (O'Leary v. Abeles, 291.)

3. BANKS—COLLECTION AGENTS—RECEIVING CHECK AS PAYMENT.—Where a bank, which receives a draft for collection, takes a check instead of money in payment thereof, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the collecting bank thus retaining the check and postponing presentment, as between him and the persons in interest whom he represents. (Morris v. Eufaula Nat. Bank, 95.)

4. BANKS—COLLECTING AGENTS—RIGHTS, HOW DETERMINED.—As between the drawer or owner of a draft and the party charged with the duty of collecting it, the question of their relative rights is to be determined by the rules of law applicable to principal and agent. (Morris v. Eufaula Nat. Bank, 95.)

5. BANKS—COLLECTING AGENT—PRESENTMENT OF CHECK.—A bank which, in payment of a draft held by it for collection, receives a check upon a local bank, which it does not pre-

sent for payment until the following day, does not thereby become liable to the drawer of the check by reason of a failure to present it with proper and reasonable diligence. (*Morris v. Bank of New York*, 95.)

6. NATIONAL BANKS—CONTROL BY STATE.—As regards the construction of contracts, the acquisition and transfer of property, the collection of debts, and the liability to suit, a national bank remains under the control of the state. (*Hawley v. Hurd*, 22.)

7. NATIONAL BANK—PRESIDENT.—The equitable rule, which forbids a principal from reaping any benefit from the wrongdoing of his agent, applies to a national bank, whose president, in excess of the powers of the bank, sells securities to one who did not know that she was dealing with the bank through its president. (*Carr v. National Bank etc. Co.*, 725.)

8. PRINCIPAL AND AGENT—FRAUDULENT ACT.—A bank is liable for the fraudulent act of its president committed in the course of his duties and employment, although the directors of the bank have no knowledge of, and do not authorize, such fraud. (*Birmingham Trust Co. v. Auten*, 295.)

See Constitutional Law, 15.

BILL OF LADING.

1. BILLS OF LADING—TRANSFER OF, VESTS TITLE TO PROPERTY.—Indorsement and delivery of a bill of lading to one who discounts the draft to which it is attached transfers to him the title to the goods in transitu covered by such bill of lading as effectually as if the goods themselves had been delivered to him. (*American Nat. Bank v. Henderson*, 147.)

2. BILLS OF LADING—CONDITIONAL PLEDGE OF PROPERTY BY TRANSFER OF.—A bill of lading stands for and represents the goods therein receipted for during their transit and until they are completely delivered to the person entitled to them, and if the consignor draws upon the consignee for the purchase price of the goods shipped, and the draft with the bill of lading attached is indorsed and transferred to a third person, who discounts the draft, a special property in the goods thereby passes to such transferee, subject to be divested by the acceptance and payment of the draft. If the consignee refuses to accept and pay such draft, the title to the property in transitu under the bill of lading becomes absolute in him as against the consignor and his creditors. (*American Nat. Bank v. Henderson*, 147.)

BLOODHOUNDS.

See Evidence, 9.

BONDS.

See Replevin; Officers.

BOUNDARIES.

See Evidence, 5, 6.

BRIBERY.

CRIMINAL LAW — INDICTMENT — TOWN ASSESSOR — BRIBES.—An indictment against a town assessor for offering to receive a bribe to reduce an assessment is insufficient unless it ap-

shows therefrom that the property assessed is situated in the town or which the accused was acting in his official capacity. (Gunning v. People, 433.)

See Evidence, 8.

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS—POWER TO ISSUE PAID-UP STOCK.—A building and loan association may, in the absence of express legislative authority, exercise the power of issuing prepaid or paid-up stock. Such right comes within the legitimate scope of the business of such associations. (Johnson v. National etc. Loan Assn., 257.)

2. BUILDING AND LOAN ASSOCIATIONS—USURY.—If a contract for a loan from a building and loan association is such as the association is authorized to make under the law creating it, the contract cannot be deemed void for usury under another statute regulating the rate of interest generally. (Johnson v. National etc. Loan Assn., 257.)

3. BUILDING AND LOAN ASSOCIATIONS—REDRESS OF CORPORATE WRONGS—ESTOPPEL AGAINST STOCKHOLDER AND BORROWER.—If paid-up stock has been issued by a building and loan association in accordance with its by-laws, one who, with knowledge thereof, becomes a member of the association as an installment stockholder for the purpose of procuring a loan, cannot maintain a suit in equity to evade his debt by having his membership in the association annulled on account of alleged corporate wrongs in issuing paid-up stock, of which he had full knowledge when he became a member and obtained the loan. (Johnson v. National etc. Loan Assn., 257.)

4. BUILDING AND LOAN ASSOCIATIONS—CANCELLATION OF CONTRACT OF MEMBER FOR FRAUD.—A stockholder and borrower from a building and loan association cannot maintain suit to cancel his contract and mortgage on the ground of fraud, consisting in false and fraudulent representations made by the association that the stock subscribed for by the borrower would mature in seventy-two months, which induced the investment in the stock and security for the loan. In such case the time of the maturity of the stock is a matter of opinion or judgment equally open to the investigation of both parties, and false representations in regard thereto are not fraudulent. (Johnson v. National etc. Loan Assn., 257.)

5. BUILDING AND LOAN ASSOCIATIONS—RIGHT OF BORROWER TO AN ACCOUNTING.—A borrowing stockholder in a building and loan association cannot maintain a bill in equity against it for an accounting, if there is no dispute as to the amount of the loan, nor as to the payments made by the complainant, either in his character of borrower or stockholder, and it is not alleged that there has been a demand and refusal for an accounting. (Johnson v. National etc. Loan Assn., 257.)

6. BUILDING AND LOAN ASSOCIATIONS—PAYMENT ON STOCK IS NOT PAYMENT ON LOAN.—If a subscriber for stock in a building and loan association transfers it thereto as part security for a loan from it, agreeing to continue his payments on the stock, and to have its withdrawal value applied in part payment of the loan, payments made upon the transferred stock are not payments made upon the loan. (Hayes v. Southern Home etc. Assn., 216.)

BURIAL

See Cemeteries.

CANCELLATION OF MORTGAGE

See Equity.

CARRIERS.

1. CARRIERS — STREET RAILWAYS — SEPARATION OF WHITE AND BLACK PASSENGERS.—A regulation of a street car company requiring white passengers to occupy seats in one portion of a car operated by it and negro passengers another is reasonable. It is immaterial that the company operates but one car and that such car is without means to separate the seats set apart for the different classes of passengers. (*Bowie v. Birmingham Ry. etc. Co.*, 247.)

2. CARRIERS — SEPARATION OF PASSENGERS.—A public carrier may, in the exercise of his private right of property, and in the due performance of his public duty, separate passengers on account of their color or of any other well-defined characterization (*Bowie v. Birmingham Ry. etc. Co.*, 247.)

3. CARRIERS — SEPARATION OF PASSENGERS — COLOR AS BASIS FOR CLASSIFICATION.—Common carriers may make color a basis of classification, and require their white and colored passengers to occupy separate seats on different parts of the same car when like accommodations are provided by both, and when such classification, and its violation by a passenger are shown, the reasonableness of such regulation is a question of law for the court (*Bowie v. Birmingham Ry. etc. Co.*, 247.)

4. CARRIERS — EXPULSION FROM CAR — EVIDENCE.—In an action by a passenger to recover for injury received in being expelled from a car by the alleged joint action of the conductor and motorman, their joint act in the expulsion of such passenger must be shown to authorize a recovery. (*Bowie v. Birmingham Ry. etc. Co.*, 247.)

CEMETERIES.

1. CEMETERIES — RIGHT OF BURIAL — WHO HAS.—The right of burial of a deceased wife or husband belongs to the surviving spouse, and in other cases to the next of kin, being present and having the ability to perform the service; and courts have the power to protect the exercise of such right. (*Enos v. Snyder*, 330.)

2. CEMETERIES — RIGHT OF BURIAL — AN EXECUTOR OR ADMINISTRATOR is not entitled as such to bury the body of his decedent, and is not entitled to its possession for that purpose, as against those who do have a right to its custody for the purpose of burial. (*Enos v. Snyder*, 330.)

3. CEMETERIES — RIGHT OF BURIAL — ENFORCEMENT OF, BY ACTION.—The fact that a penalty for not burying a dead body is also imposed upon the one whose duty it is to bury it does not affect the right of custody which the law gives, and a clear enactment of substantive law establishing such a right may be considered and enforced in a civil action, though it is found in the Penal Code. (*Enos v. Snyder*, 330.)

4. CEMETERIES — RIGHT OF BURIAL — RELATIVES — CLAIMANTS BY WILL.—If a man dies, his surviving wife and daughter have the right to the possession of his body, for the purpose of burying it, as against others who claim that right under the provisions of a will. (*Enos v. Snyder*, 330.)

CERTIORARI.

See Justice of the Peace, 2; Writ of Review.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGES FOR PURCHASE PRICE.—A mortgage given upon goods as part of the same transaction in which they are purchased, and to secure their purchase price, is not constructively fraudulent as to creditors of the vendee. (Cox v. Birmingham Drygoods Co., 238.)

2. CHATTEL MORTGAGES FOR PURCHASE PRICE—EFFECT AS TO CREDITORS.—If a mortgage given upon goods as part of the same transaction in which they are purchased and to secure their purchase price stipulates that the vendee may sell the goods thus purchased in the regular course of business, and use the money derived from such sales to replenish the stock of goods, but that such after-acquired goods are to be subject to the mortgage, it is not fraudulent as to subsequent creditors of the mortgagor, in the absence of evidence of fraudulent intent or insolvency on the part of the mortgagor. (Cox v. Birmingham Drygoods Co., 238.)

CHECKS.

See Banks and Banking, 1, 2; Negotiable Instruments.

CONCEALED WEAPONS.

CRIMINAL LAW—CARRYING CONCEALED WEAPONS.—One may be guilty of carrying a concealed weapon while alone in his own home. (Dunston v. State, 152.)

CONSTABLES.

1. CONSTABLES—DUTY OF, IN LEVY OF EXECUTION.—A constable is bound to obey the mandate of an execution placed in his hands, if the writ is regular on its face and issued by competent authority, whether the judgment supporting it is regular or irregular. (Ward v. Deadman, 172.)

2. CONSTABLES—LEVY OF EXECUTION—PROTECTION OF WRIT—VOID JUDGMENT.—An execution, regular on its face protects a constable in obeying its mandate, though issued on a void judgment. (Ward v. Deadman, 172.)

3. CONSTABLES—LEVY OF EXECUTION—WHAT INDORSEMENT IS A MANDATE.—The words "no personal property exempt from levy and sale," indorsed by a justice of the peace on an execution issued to a constable, constitute a mandate which the officer may obey without being guilty of trespass in so doing, though the judgment is void. (Ward v. Deadman, 172.)

4. CONSTABLES—INDORSEMENT OF EXECUTION, WHEN MAY BE OBEYED.—A constable who receives a writ of execution to levy is not bound to look beyond an indorsement thereon of "no personal property exempt from levy and sale" further than to know that the execution was issued by a court of competent jurisdiction. (Ward v. Deadman, 172.)

CONSTITUTIONAL LAW.

1. STATUTES — CONSTITUTIONALITY — PRESUMPTION.—Every legislative act is presumed to be constitutional, and every indictment must be indulged by the courts in favor of its validity. (Alabama etc. R. R. Co. v. Reed, 166.)

2. STATUTES—EXPRESSION OF SUBJECT IN TITLE.—The provision of a constitution declaring that "each law shall contain but one subject, which shall be clearly expressed in its title, etc.," is satisfied when the title of an act expresses but one general subject, and all its provisions are allied to the subject expressed, or, as is usually said, germane or cognate to it. (Alabama etc. R. R. Co. v. Reed, 166.)

3. STATUTES—EXPRESSION OF SUBJECT IN TITLE—ILLUSTRATION OF.—An act entitled, in substance, an act to authorize the court of county commissioners of a designated county to issue bonds and to dispose thereof "for the purpose of securing means" for building and furnishing a courthouse, and for building an addition to the county jail, does not offend a provision of the constitution requiring each law to contain but one subject, which shall be expressed in its title. The legislature has a right to provide any method for securing such means, and may authorize the levy of a special tax wherewith to pay the interest on the bonds and the principal at maturity, for such method is cognate to the subject expressed in the title of the act. (Alabama etc. R. R. Co. v. Reed, 166.)

4. CONSTITUTIONAL LAW—TITLE OF ACT.—Legislation regulating the right of a wife in her deceased husband's estate, either real or personal, may constitutionally be enacted either under the title of "Husband and Wife" or "Descent and Distribution." (Hoskins v. Crabtree, 576.)

5. CONSTITUTIONAL LAW—TITLE OF ACT.—An act entitled "An act to amend an act entitled An act relating to 'husband and wife,' changing the right of a widow in her deceased husband's personalty," is germane to the title, although that subject theretofore has been provided for and treated of under the head of "descent and distribution." (Hoskins v. Crabtree, 576.)

6. CONSTITUTIONAL LAW—CLASS LEGISLATION—WHEN VALID.—Legislation in favor of a particular class of individuals, in order to be valid, must extend to and embrace equally all persons who are or may be in the like situation or circumstances, and the classification must be natural and reasonable, not arbitrary or capricious. (State v. Garbroski, 524.)

7. CONSTITUTIONAL LAW—SPECIAL PRIVILEGES TO VETERANS—PEDDLER'S TAX.—A statute which requires a license fee to be paid by all persons who peddle in the country, except veterans of the Civil War, is unconstitutional and void, since it grants to one class of citizens privileges or immunities that on the same terms do not belong to all. (State v. Garbroski, 524.)

8. CONSTITUTIONAL LAW—SPECIAL PRIVILEGES—GAS LAMPS.—A statute providing for the use of gas manufactured from petroleum, which requires a person to use a particular lamp, naming it, when others equally safe are in the market, is invalid as violating a provision of the constitution prohibiting the legislature from granting "to any citizen or class of citizens privileges or immunities, which upon the same terms shall not equally belong to all citizens." (State v. Santee, 489.)

9. CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—It is only where the language of a statute will bear two constructions that a court is justified in applying a rule that will sustain the act, rather than one which will defeat it; but this rule of construction cannot be used for the purpose of adding to or taking from the plainly expressed language of the legislature. (State v. Santee, 489.)

10. CONSTITUTIONAL LAW—ACT VOID IN PART.—An act void in part is not necessarily void in toto, and if sufficient remains

to effect its object without the aid of the invalid portion, the latter only will be rejected. (State v. Santee, 489.)

11. **CONSTITUTIONAL LAW—ACT VOID IN PART—USE OF PETROLEUM.**—A statute, the general purpose of which is to prohibit the use of the lighter products of petroleum for illuminating purposes, and which is capable of enforcement without reference to an exception contained therein, is not rendered invalid in its entirety by reason of the unconstitutionality of the exception. (State v. Santee, 489.)

12. **CONSTITUTIONAL LAW—IMMUNITIES OF CITIZENS.—CORPORATIONS** are not citizens within the meaning of article 4, section 2, of the United States constitution, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. (Hawley v. Hurd, 922.)

13. **CONSTITUTIONAL LAW—ABRIDGING PRIVILEGES OF CITIZENS.—CORPORATIONS** are not citizens within the meaning of article 14, section 1, of the amendments to the United States constitution, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. (Hawley v. Hurd, 922.)

14. **CONSTITUTIONAL LAW—PERSONS WITHIN STATE—EQUAL PROTECTION OF LAWS.**—A foreign corporation not doing business within a state is not within the protection of article 14, section 1, of the amendments to the United States constitution, which declares that no state shall deny to any person "within its jurisdiction" the equal protection of the laws. (Hawley v. Hurd, 922.)

15. **CONSTITUTIONAL LAW — NATIONAL BANKS. — A STATE** can exercise no control over a national bank, nor in any wise affect its operation except as Congress may permit, but this protection is limited to such legislation as tends to impair its utility as an instrumentality of the federal government. (Hawley v. Hurd, 922.)

16. **CONSTITUTIONAL LAW—LAW REGULATING RATE OF WAGES.**—The New York labor law requiring contractors for public work, employed by a city, to pay their laborers, workmen, and mechanics not less than the prevailing rate of wages in the locality, and requiring contractors to insert in their contracts a provision of such law that the contracts shall be void unless such rate of wages is paid, is unconstitutional: 1. Because in its actual operation it permits and requires the expenditure of the money of the city or that of the local property owner for other than city purposes; 2. Because it invades rights of liberty and property, in that it denies to the city and the contractor the right to agree with their employes upon the measure of their compensation, and compels them in all cases to pay an arbitrary and uniform rate which is expressed in vague language, difficult to define or ascertain and subject to constant change from artificial causes; 3. Because it virtually confiscates all property rights of the contractor under his contract for breach of his engagement to obey the statute, and it attempts to make acts and omissions penal which, in themselves, are innocent and harmless. It, in effect, imposes a penalty upon the exercise by the city or by the contractor of the right to agree with their employes upon the terms and conditions of the employment. (People v. Coler, 605.)

CONTRACTS.

1. CONTRACTS—SIGNING—IGNORANCE OF CONTENTS—CARE REQUIRED.—One who has signed a contract in negligent ignorance of its contents cannot, in the absence of fraud or misrepresentation, set up such ignorance in avoidance of the obligation. If he could not read, due care for his own interest required that he should have the contract read to him. (*Bates v. Harte*, 186.)

2. CONTRACTS—SIGNING OF, PROCURED BY FRAUD—VALIDITY.—If a party about to sign an instrument has no knowledge of its contents, and is induced by misrepresentations of the opposite party to sign it, the fraud involved in such misrepresentations furnishes a defense to an action based upon the purported undertaking. (*Bates v. Harte*, 186.)

3. CONTRACTS—FAILURE OF ONE PARTY TO PERFORM—RECOVERY.—A party who fails to perform his part of a contract cannot recover thereon where the other party is not at fault in the matter. (*Bates v. Harte*, 186.)

4. CONTRACTS—SIGNING BY MARK—LACK OF ATTESTATION—EFFECT OF.—An instrument signed by a mark only is valid, except where the statute requires a mark and the name of an attesting witness. Hence, a contract, not required to be so signed, but which is signed by a mark without attestation, is admissible in evidence. (*Bates v. Harte*, 186.)

5. CONTRACT TO MAKE ONE AN HEIR—STATUTE OF WILLS—CONFLICT.—An agreement made by a childless woman to maintain another's boy as her own child, and at her death to give him her property and make him her sole heir, does not conflict with the statute relating to wills and their execution, because the contract is not in the nature of a testamentary disposition of property, but is to be chiefly executed during the life of the promisor, with compensation to be made at her death. (*Winnie v. Winnie*, 647.)

6. CONTRACT TO MAKE ONE AN HEIR—CONSIDERATION—VALIDITY—PUBLIC POLICY.—An agreement made by a childless woman to maintain another's boy as her own child, and at her death to give him her property and make him her sole heir, is based upon a valuable and sufficient consideration, where the promisor, by virtue of her agreement, receives the custody, control and services of the boy during his minority, and is not invalid upon any principle of public policy. (*Winnie v. Winnie*, 647.)

See Gambling Contracts.

CONVERSION.

See Trover and Conversion.

CORPORATIONS.

1. CORPORATIONS—STOCKHOLDERS—REDRESS OF CORPORATE WRONGS.—If injury results to a shareholder in a building and loan association or other corporation, by an abuse of corporate power, the wrong must be redressed within the corporation if possible. A stockholder cannot maintain suit against the corporation to redress a corporate wrong until he has done all in his power to obtain, within such corporation, redress for the wrong complained of, or has shown by his bill a sufficient reason for his failure to do so. (*Johnson v. National etc. Loan Assn.*, 257.)

2. CORPORATIONS—DIRECTORS' LIABILITY FOR DEBTS. Where the purpose of a statute is to furnish a remedy to the creditors of a corporation who have been injured by the directors' violation of the requirements of the statute, the liability imposed upon such officers is contractual, and actions upon such statutes can be brought in any state in courts of competent jurisdiction. (Farr v. Briggs, 930.)

3. CORPORATIONS—DIRECTORS' LIABILITY—SURETIES. Under a statute which imposes upon the directors of corporations who assent to the creation of debts beyond a certain limit a personal liability to the creditors for such debts, the liability arises out of the assent to the contract creating the debt, and is similar to that of sureties and guarantors. (Farr v. Briggs, 930.)

4. CORPORATIONS—AGENT'S ACT IN TRYING TO BRIBE A WITNESS AGAINST.—When a corporation employs an investigator, with respect to the trial of actions against it, "to see to the witnesses," to take statements, and to interview witnesses, including those who expect to be, as well as those who are, witnesses, without limitation as to the means to be employed, the investigator's act to promote the interest of the corporation, by attempting to bribe a witness to testify falsely in its favor, is within the scope of the business intrusted to him, and is, therefore, the act of the corporation. Hence, evidence of such act is admissible against the corporation without proof of some corporate act expressly authorizing the agent to tamper with the witness. (Nowack v. Metropolitan St. Ry. Co., 691.)

5. LIMITATION OF ACTIONS—STATUTORY LIABILITY.—A statute providing that if the officers of any corporation shall neglect or refuse to file the certificate required by law they shall jointly and severally be liable for all debts of such corporation contracted during the period of such neglect or refusal, creates a statutory, and not a penal, liability, which is barred in three years under the statute applicable to all actions founded upon any contract or liability, express or implied, not in writing. (Nebraska Nat. Bank v. Walsh, 301.)

6. CORPORATIONS, FOREIGN—STOCKHOLDERS' LIABILITY.—The liability of stockholders in a foreign corporation cannot be enforced in a state other than the state of its incorporation by a suit in equity in which part only of the creditors are made parties plaintiff, and only one stockholder is made party defendant. To maintain such a suit, it must be in behalf of all the creditors and against all of the stockholders, and the corporation itself must be made a party to the suit. (Bates v. Day, 811.)

7. FOREIGN CORPORATIONS—SUITS AGAINST, WHERE MAINTAINABLE.—At common law, to maintain a personal action against a corporation, there must have been service of process upon its principal officer within the jurisdiction of the sovereignty creating it; hence, in the absence of statute, a foreign corporation could not be sued outside of the state of its domicile. (Pullman Palace Car Co. v. Harrison, 68.)

8. FOREIGN CORPORATIONS—LIABILITY FOR TORT COMMITTED IN ANOTHER STATE.—A foreign corporation, though doing business in a state through its agents located there, cannot be held liable for a tort committed in another state. (Pullman Palace Car Co. v. Harrison, 68.)

9. FOREIGN CORPORATIONS—ATTACHMENT AGAINST—TORT COMMITTED IN ANOTHER STATE—JURISDICTION.—Where a statute, permitting attachment against foreign corpora-

tions, provides that a preliminary affidavit must set out the cause of action, a complaint must be filed, the cause tried as in suits commenced by summons and complaint, and the judgment must ascertain and declare the amount of the debt, claim, or demand sought to be enforced by the attachment, the seizure of property of such a corporation under a writ of attachment is not sufficient to give the court jurisdiction. The question of jurisdiction is determined by the power of the court to decide upon the cause of action presented by the pleadings. Hence, where the pleadings show that the demand against a foreign corporation grew out of a tort committed by it in another state, its property situated in the state cannot be attached in a suit to satisfy such demand. (*Pullman Palace Car Co. v. Harrison*, 68.)

See Constitutional Law, 14.

COUNTERCLAIM.

See Setoff and Counterclaim.

COUNTIES.

COUNTIES.—THE CREATION OF A SANITARY DISTRICT BY A BOARD OF SUPERVISORS IS VOID unless the notice required by law was posted. Hence, where there is no evidence of such posting, and no recital thereof in the record, a subsequent declaration of the board that the district was duly organized is a nullity. (*Stumpf v. Board of Supervisors*, 350.)

COVENANTS.

1. A COVENANT AGAINST ENCUMBRANCES ATTACHES TO AND RUNS WITH THE LAND AND PASSES to a remote grantee through the line of conveyances, whether there is a nominal breach or not when the deed is delivered. (*Geiszler v. De Graaf*, 659.)

2. COVENANT AGAINST ENCUMBRANCES—EXTINGUISHMENT OF, BY AN INTERMEDIATE PURCHASE SUBJECT TO A LOCAL ASSESSMENT.—If land encumbered by a local assessment is conveyed with a covenant against encumbrances, and is afterward purchased subject to the assessment, the effect of such purchase is to extinguish the benefit of the covenant. Hence, a subsequent grantee, who acquires title under a deed containing a new covenant against encumbrances, cannot maintain an action against the original grantor upon the old covenant. (*Geiszler v. De Graaf*, 659.)

3. COVENANT AGAINST ENCUMBRANCES EMBRACES TAXES.—The covenant against encumbrances implied from a deed of grant embraces taxes. (*McPike v. Heaton*, 835.)

4. COVENANT AGAINST ENCUMBRANCES DOES NOT RUN WITH LAND.—A covenant, whether express or implied, that land granted is free from encumbrances, does not run with the land, or pass to an assignee or succeeding grantee. (*McPike v. Heaton*, 835.)

5. COVENANT AGAINST TAXES IS PERSONAL AND DOES NOT RUN WITH THE LAND.—An implied covenant in a grant that the land is free from taxes is personal, and does not run with the land. (*McPike v. Heaton*, 835.)

See Taxation, 8.

CREDITORS' BILLS.**CREDITORS' BILLS—CANCELLATION OF MORTGAGE.—**

A creditor having a lien by execution may resort to equity for the removal of obstacles fraudulently employed to defeat an execution, and which would prevent a sale at value thereunder. A bill in equity may be maintained for the cancellation of a fraudulent mortgage, in aid of a specific execution lien upon the property covered by the mortgage, and which the complainant has the right to pursue. (*Boutwell v. Vandiver*, 149.)

See **Fraudulent Conveyances**, 4, 5.

CROPS.

1. CROPS—WHEN PERSONAL PROPERTY AND WHEN NOT.—If crops have been actually severed, they are personal property, and do not pass to him who afterward purchases the land; otherwise they go with the land. (*Jones v. Adams*, 766.)

2. CROPS—SEVERANCE BY CHATTEL MORTGAGE.—The giving of a chattel mortgage on a growing crop, prior to a sale of the land, is not a constructive severance of such crop. (*Jones v. Adams*, 766.)

3. CROPS—CONFLICT BETWEEN MORTGAGEE AND PURCHASER AT FORECLOSURE SALE OF LAND.—A crop of grain standing on mortgaged land at the time of its sale under a decree of foreclosure belongs to the purchaser of the land, notwithstanding a previous chattel mortgage given upon such crop. (*Jones v. Adams*, 766.)

4. CROPS—LEASE FOR PART OF CROP—SHARE IS DUE, WHEN.—When land is leased for a part of the crop to be raised thereon, and the lease contains no stipulation as to when such share is payable, it is due when the crop is harvested, or within a reasonable time thereafter. (*Jones v. Adams*, 766.)

CURTESY.

ESTATES BY CURTESY—LIFE ESTATES.—A surviving husband does not take an estate as tenant by the curtesy in lands held by his wife only as a tenant for life. (*Waller v. Martin*, 882.)

DAMAGES.

1. DAMAGES FOR NEGLIGENTLY CAUSING DEATH OF RELATIVE—QUESTION FOR JURY.—In a statutory action brought by the next of kin of a person negligently killed there may be a recovery of damages which are not capable of exact proof, being remote, uncertain, and not recognized by the common law. It is a question for the jury to determine, in the exercise of a reasonable discretion, what damages, in addition to actual money damages as proved, the next of kin of the intestate have suffered, if any, considering the situation as proved. (*Countryman v. Fonda* etc. R. R. Co., 640.)

2. NEGLIGENCE CAUSING DEATH—DAMAGES—WOUNDED FEELINGS.—If a person is killed by the negligence of another, the jury may consider the wounded feelings of the beneficiaries in estimating damages, under a statute providing that the jury is authorized to give "such damages as it may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought." (*Nohrden v. Northeastern R. R. Co.*, 826.)

DEAD BODY.

See Cemeteries; Wills, 6.

DEATH.

See Damages, 1, 2; Negligence, 20.

DEEDS.

1. DEEDS—FAILURE TO SIGN—VALIDITY—RECORD OF AS EVIDENCE.—A deed in the usual form, but not signed, though acknowledged by the grantor and recorded, is not valid and the record of such deed is not admissible in evidence, as the recording thereof is unauthorized. (*Helton v. Asher*, 601.)

2. DEEDS—GRANTORS, WHO ARE.—If one or more persons are mentioned in the body of a conveyance as grantors, and their names are subscribed to it, the additional signature of another person who is nowhere mentioned in the instrument does not make it his deed. (*Adams v. Teague*, 144.)

3. DEEDS—WIFE'S LAND—HUSBAND'S ASSENT.—The assent and concurrence of a husband required by statute to give validity to a conveyance of his wife's lands can be manifested only by his joining in the alienation in such way as would be necessary to the conveyance of his interest if the land belonged to him in severalty or jointly, or in common with others. If such deed is signed by him, but his name appears nowhere in the body of the instrument, it is void. (*Adams v. Teague*, 144.)

4. DEEDS—DELIVERY.—If a voluntary conveyance from husband to wife is recorded by the grantor with the knowledge and consent of the grantee, and is subsequently in her possession, and after her death is found in the possession of her father, and the grantor, after the execution of the deed, has expressed satisfaction with what he has done, and has announced that it is his intention thereby to give the property to his wife, there is a valid delivery of such deed. (*Shields v. Bush*, 474.)

5. DEEDS—PRESUMPTION OF DELIVERY.—Although the act of recording a deed does not amount to a delivery, yet when it appears that the grantee therein has knowledge of such recording and has assented thereto, and the recorded deed is subsequently found in his possession, this amounts to prima facie evidence of delivery. (*Shields v. Bush*, 474.)

6. DEEDS—DELIVERY.—Anything which clearly manifests the intention of the grantor in a deed and the person to whom it is delivered that the deed shall presently become operative and effectual, and whereby the grantor loses all control over it, constitutes a sufficient delivery. (*Shields v. Bush*, 474.)

7. DEEDS.—DECLARATIONS OF THE GRANTOR in a deed made prior or subsequently to its execution are not admissible to impeach it; but his subsequent declarations showing that he is satisfied with the deed are admissible to uphold it. (*Shields v. Bush*, 474.)

8. DEEDS.—PRESUMPTIONS OF DELIVERY of deeds are stronger in cases of voluntary settlements than in cases of ordinary bargain and sale deeds. (*Shields v. Bush*, 474.)

9. DEEDS—ALTERATION OF—SUBSTITUTION OF GRANTEEES.—If a deed is altered by the substitution of grantees after final delivery, and without the consent of the first grantee, it cannot support a claim to the land conveyed by the deed, asserted by the person whose name is substituted. (*Abbott v. Abbott*, 470.)

10. DEEDS—ALTERATION OF—SUBSTITUTION OF GRANTEEES.—If a deed is altered after final delivery, by the substitution of grantees with the consent of the first grantee, it becomes absolutely void. The first grantee cannot thereafter repudiate the substitution of grantees, and claim title in himself. (*Abbott v. Abbott*, 470.)

11. DEEDS—ALTERATION OF—SUBSTITUTION OF GRANTEEES.—If a deed is altered by the substitution of grantees after delivery to the first grantee, with his consent and that of the grantor, and again subsequently delivered, the deed is valid. (*Abbott v. Abbott*, 470.)

12. DEEDS—PRESUMPTION OF DELIVERY TO MINOR.—The presumption in favor of the delivery of a voluntary deed to a minor can be overcome only by clear proof on the part of the grantor that there was no such delivery. (*Abbott v. Abbott*, 470.)

13. DEEDS—ESTOPPEL AGAINST MARRIED WOMEN.—A married woman having capacity to convey her land without consideration binds herself by such a conveyance by its recital of a valuable consideration, and is estopped, like any other grantor, to show that there was in fact no consideration. (*Stacey v. Walter*, 235.)

14. DEEDS—PAROL AGREEMENT TO VARY TERMS OF.—A parol agreement, made contemporaneously with the execution of a deed, that it should be destroyed at the expiration of one year, is not sufficient to invalidate it. In the absence of fraud, accident, or mistake in the execution of such deed, it must be given full effect. (*Stacey v. Walter*, 235.)

See Covenants; Homesteads, 3; Mortgages, 2-13; Trusts, 5-7.

DEFINITIONS.

Bona fide purchaser. (*Jones v. Chenault*, 211.)

Brothers and sisters. (*Estate of Smith*, 358.)

Fixtures. (*Thompson v. Smith*, 541.)

Improvements. (*Bates v. Harte*, 186.)

Patent ambiguity. (*Johnson v. Whitefield*, 196.)

Railroad purposes. (*Abraham v. Oregon etc. R. R. Co.*, 772.)

DESCENT AND DISTRIBUTION.

1. DESCENT—LANDS WITHIN UMATILLA INDIAN RESERVATION.—The question of heirship to lands which belonged to an allottee thereof within the Umatilla Indian Reservation must be determined from the statutes of Oregon. (*Non-she-po v. Wa-win-ta*, 749.)

2. DESCENT—BROTHERS AND SISTERS INCLUDE THOSE OF HALF BLOOD.—The expression "brothers and sisters of the decedent," in a statute of descent, providing that, in certain cases, one-half of the estate shall go to them, includes those of the half blood. (*Estate of Smith*, 358.)

3. DESCENT—EXCLUSION OF HALF BLOOD.—A statute of descent which provides that kindred of the half blood shall inherit equally with those of the whole blood in the same degree, but which excludes kindred of the half blood in favor of kindred of the whole blood when the former are not of the blood of the ancestor from whom the estate came by descent, devise or gift, applies only where such kindred are "in the same degree." It does not apply to a case in which the degrees are not the same. The half blood are excluded only when there are others in the same statu-

tory class who are to be preferred by reason of being of the blood of the ancestor from whom the estate came to the intestate. (Estate of Smith, 858.)

4. DISTRIBUTION—HALF-SISTERS ARE ENTITLED TO, WHEN.—If a wife dies intestate, leaving property inherited from her father, and surviving her husband, and two half-sisters on the mother's side, one-half of the estate, the other half going to the husband, must be distributed to such half-sisters, for there are no others in the same degree or statutory class who are to be preferred by reason of their being of the blood of the ancestor from whom the estate came to the intestate. (Estate of Smith, 858.)

DEVISE.

See Wills.

DIVORCE.

See Marriage and Divorce.

DOWER.

1. DOWER AFTER VOLUNTARY PARTITION.—A wife is not barred of her dower by a voluntary partition of land among the grantee of her husband and other cotenants. (Gaffney v. Jefferies, 860.)

2. DOWER AFTER VOLUNTARY PARTITION.—If lands held by a husband in cotenancy during coverture are conveyed by him, and by his grantee, and the other cotenants voluntarily partitioned, the wife is entitled to her whole dower out of the land set apart to her husband's grantee. (Gaffney v. Jefferies, 860.)

EJECTMENT.

EJECTMENT—TITLE—JURISDICTION OF JUSTICE. The object of an action of ejectment is not merely to recover the possession of lands, but to settle the title and establish the right of property, and the title to land being necessarily involved in such an action, a justice of the peace is without jurisdiction. (Sartwell v. Sowles, 943.)

See Husband and Wife, 11, 12.

ELEVATORS.

1. ELEVATORS—CARE REQUIRED OF OWNERS.—Persons operating elevators in buildings for the purpose of carrying persons from one story to another are common carriers of passengers, required to exercise the highest and utmost care and diligence to prevent injury to them. (Springer v. Ford, 464.)

2. ELEVATORS—PRESUMPTION OF NEGLIGENCE FROM ACCIDENT.—If a passenger is injured by reason of the giving way of some portion of the machinery or appliances by which an elevator is operated, this, unexplained, raises a presumption of negligence on the part of the owner, or his servants. (Springer v. Ford, 464.)

3. ELEVATORS—PASSENGER AND FREIGHT.—Rules governing the liability of owners or operators of passenger elevators apply with equal force to freight elevators run for hire, and carrying persons rightfully thereon. (Springer v. Ford, 464.)

4. ELEVATORS—CARRIERS OF PASSENGERS FOR HIRE.—The proprietor of an elevator run for the use of the tenants of an

Ice building is a carrier of passengers for hire. (Springer v. Ford, 464.)

5. ELEVATORS—RIGHT TO RIDE.—Whether a person was lawfully on an elevator at the time of injury, in the performance of duty incident to his employment, is a question of fact for the jury. (Springer v. Ford, 464.)

6. ELEVATORS—LIMITATION OF LIABILITY.—A condition in a lease that the owner of the building shall not be liable for any damages caused by a failure to keep an elevator therein in repairs is not binding upon a servant of the lessee who is injured while upon such elevator. A carrier of passengers cannot limit his liability except by express contract with the passenger. (Springer v. Ford, 464.)

7. ELEVATORS—EVIDENCE.—In an action to recover for injury received while riding on a freight elevator, evidence is admissible to show that it was plaintiff's custom, as well as the custom of other tenants and employes in the building, to accompany freight being transported by them in such elevator operated by the defendant or his servants. (Springer v. Ford, 464.)

8. NEGLIGENCE—PRESUMPTION OF FROM ELEVATOR ACCIDENT.—The mere happening of an elevator accident does not raise the presumption of negligence in its operation, or that the machinery was unsafe or defective. (Spees v. Boggs, 792.)

9. ELEVATORS—INFERENCE OF NEGLIGENCE FROM ACCIDENT.—If an elevator descends from the eighth floor of a building to the basement thereof with unusual rapidity, and, instead of stopping at the basement, passes beyond until it strikes the bumpers at the bottom of the shaft with such force as to rebound about eighteen inches, and the counterbalance weights immediately fall down the shaft, break through the top of the car, and strike and kill one of its passengers, the jury have a right, under the doctrine of *res ipsa loquitur*, to infer negligence from the accident alone. (Griffen v. Manice, 630.)

10. ELEVATORS—MAINTENANCE AND OPERATION OF—DEGREE OF CARE REQUIRED.—The owner of a building, who maintains and operates an elevator therein to carry passengers, is bound only to exercise reasonable care. Hence, he is not bound to use the utmost care as to every defect which would be liable to occasion great danger or loss of life, nor is he "subject to the same rule that applies to a railroad company in regard to its roadbed, engine, and other similar machinery." (Griffen v. Manice, 630.)

11. ELEVATORS—NEGLIGENCE—OWNER IS NOT EXEMPTED FROM LIABILITY FOR, BY TERMS OF LEASE.—Though a lease declares that the lessor "shall not be responsible for any loss or injury arising from or during the use of the elevator, or the carelessness or negligence of any person," such provision does not exempt him from liability for the death of an employe of the lessee. (Griffen v. Manice, 630.)

EMINENT DOMAIN.

1. EMINENT DOMAIN—PUBLIC USE, QUESTION OF IS FOR THE JUDICIARY.—While the legislature usually takes the initiative, and by its enactment of laws necessarily declares whether a use for which they authorize the taking of private property is public, still it remains for the courts to ultimately determine this question when it is appropriately brought to their notice. (Fanning v. Gilliland, 758.)

2. EMINENT DOMAIN—LAND NOT INCLUDED IN PETITION FOR CONDEMNATION—VOID ORDER.—In condemnation proceedings, commissioners appointed to assess damages are not authorized to include in their report lands not embraced or described in the petition, and an order of court purporting to condemn them is void. (*Hobbs v. Nashville etc. Ry.*, 103.)

See Highways, 3-7.

EQUITY.

1. EQUITY—CANCELLATION OF MORTGAGE—DOING OF EQUITY.—When the facts creating the invalidity of a mortgage rest in parol, a complaining mortgagor may have relief in equity to enjoin a sale thereunder and to decree the cancellation of the mortgage as a cloud upon his title, but he will first be required to do equity by returning any unpaid portion of the money borrowed or its equivalent with interest at the legal rate. (*Hayes v. Southern Home etc. Assn.*, 216.)

2. EQUITY—ASCERTAINING TERMS OF CONTRACT FROM VOID MORTGAGE.—A court of equity, having acquired jurisdiction for relief from a mortgage, may, if it is desired, settle the whole controversy, and in doing so, may look into the mortgage, if necessary, though it is void as a conveyance, for the purpose of ascertaining other terms of the contract between the parties. (*Hayes v. Southern Home etc. Assn.*, 216.)

3. EQUITY—CANCELLATION OF MORTGAGE—DOING EQUITY—ACCOUNTING.—If a stockholder of a building and loan association borrows money from it, gives a mortgage on his homestead as part security, transfers shares of stock as other security, and then brings a suit, in which he seeks to have the mortgage declared void on the ground that his wife's acknowledgment thereto was void, and in which he asks for an accounting, the withdrawal value of the stock may be ascertained and credited on the loan, and, if the credit is insufficient to extinguish the loan, with interest, the plaintiff should be required to pay the balance as a condition to relief respecting the mortgage. (*Hayes v. Southern Home etc. Assn.*, 216.)

See Pleading, 10-15; Quieting Title.

ESTATE OF DECEDENT.

See Executors and Administrators.

ESTOPPEL.

See Infants, 1-3.

EVIDENCE.

1. EVIDENCE—ADMISSIBILITY.—WHEN THE GENERAL ISSUE is pleaded, the onus is cast upon the plaintiff of proving every material allegation of the complaint. No evidence is properly admissible in behalf of the plaintiff which does not tend to support the averments of the complaint, and the defense is limited to evidence in disproof of such averments. (*Blankenship v. Blackwell*, 175.)

2. PAROL EVIDENCE IS NOT ADMISSIBLE TO SHOW MEANING OR UNDERSTANDING OF COMMON WORDS.—It is not competent for either of the parties to a contract, where the language is plain and unambiguous, to prove by parol evidence

how it was understood, or the meaning of the words used. (*Abraham v. Oregon etc. R. R. Co.*, 779.)

3. **PAROL EVIDENCE IS NOT ADMISSIBLE TO EXPLAIN THE WORDS "LEGITIMATE RAILROAD PURPOSES."**—If land is conveyed to a railroad company "for all legitimate railroad, depot, and warehouse purposes," parol evidence is not admissible to show that the words "legitimate railroad purposes" were used with a special meaning, and that the deed to the company was not intended to, and did not, convey to it the right to use the property for all legitimate railroad purposes. (*Abraham v. Oregon etc. R. R. Co.*, 779.)

4. **EVIDENCE—DISCRETION OF COURT IN ADMITTING.**—If evidence is competent at the time it is introduced, and when the evidence is closed by both parties before the court adjourns until the next day, it is within the discretion of the court to decline to reopen the case upon its reconvention for the purpose of allowing the introduction of other evidence, the effect of which would, or might be, to show the impertinency of the evidence already admitted. (*Morrissett v. Wood*, 127.)

5. **EVIDENCE—JUDICIAL NOTICE—BOUNDARIES.**—Courts take judicial notice of the political divisions of the state into counties, towns, and cities, and that a county is under township organization, and that a particular township is in a certain county, and of the relative location of such towns with respect to one another. (*Gunning v. People*, 433.)

6. **EVIDENCE—JUDICIAL NOTICE—BOUNDARIES.**—Courts take judicial notice of the boundaries of towns when they have been fixed by law; but they cannot take judicial notice of the precise location of a city lot in a subdivision or resubdivision of urban lands, with respect to city, township, or other political divisional lines, without the aid of a public statute. (*Gunning v. People*, 433.)

7. **NEGLIGENCE—EVIDENCE—LAW OF ANOTHER STATE.** If, in an action to recover for injury received through the negligence of a railroad company committed in another state, the statute law of that state is proved, parol testimony of the construction placed upon such statute by the supreme court of that state is not admissible, because it is not the best evidence. (*St. Louis etc. Ry. Co. v. Stewart*, 311.)

8. **EVIDENCE OF ATTEMPT TO BRIBE A WITNESS.**—Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor is competent, but not conclusive as an admission by acts and conduct that his case is weak and his evidence dishonest. (*Nowack v. Metropolitan St. Ry. Co.*, 691.)

9. **EVIDENCE AS TO TRAILING WITH A BLOODHOUND.**—If one accused of crime is admissible to connect him therewith only when it is shown by someone having personal knowledge of the fact that the dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination; that he is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings; that such dog was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him. (*Pedigo v. Commonwealth*, 566.)

10. **EVIDENCE OF TITLE—MORTGAGE AS.—IN TRYING THE RIGHT OF PROPERTY** levied on under execution, a mort-

gage relied on by the claimant is properly excluded as evidence of his title, where it contains a certain and definite description of property, but variant from the property claimed. (*Johnson v. Whitfield*, 196.)

11. **DEFINITIONS.—A PATENT AMBIGUITY**, or ambiguity apparent, is where the contract or conveyance on its face, or aided by judicial construction, equally describes two or more persons or things. (*Johnson v. Whitfield*, 196.)

12. **EVIDENCE—CONTRACT SIGNED IN PARTS—ADMISSIBILITY.**—If a contract is in two parts, each party having signed only the part containing his promises, both parts are admissible in evidence and the defendant cannot complain where his own ill-founded objection results in the admission of one part to the exclusion of the other. (*Bates v. Harte*, 186.)

13. **EVIDENCE—LOST WRITINGS.**—Due execution and genuineness of an alleged lost paper must be shown before secondary evidence of its contents is admissible. (*Helton v. Asher*, 601.)

14. **EVIDENCE—DECLARATIONS OF DECEDENT.**—A party to an action cannot testify in his own favor as to declarations made by his deceased ancestor, from whom he and his opponent derive title to the land in dispute. (*Helton v. Asher*, 601.)

15. **EVIDENCE—PARTIES—REPORT OF SURVEYOR.**—The rights of persons cannot be affected by the report of a surveyor made in an action to which they were not parties. (*Helton v. Asher*, 601.)

16. **EVIDENCE—RES GESTAE—CONVERSATIONS—OWNERSHIP OF PROPERTY.**—If goods in a husband's possession are levied on, and his wife interposes a claim to them in an action to try the right of property, conversations had between the claimant and her husband prior to the levy are a part of the *res gestae* relating to the fact of ownership of the goods, or of the husband's agency in purchasing and controlling them, and as such are admissible in evidence. (*Jones v. Chenault*, 211.)

17. **EVIDENCE—SHIFTING OF BURDEN.—SLIGHT EVIDENCE** is sufficient to shift the burden of proof of a fact from the plaintiff to the defendant, where the knowledge of such fact is peculiarly within the knowledge of the defendant, and which, in the nature of things, it would be difficult for the plaintiff to prove. (*Joost v. Craig*, 374.)

18. **EVIDENCE—WITNESSES MAY TESTIFY TO THE ABSENCE** of a thing or the nonappearance of an event, if it is shown that they were in a position to see and hear the thing inquired about. (*Tennessee etc. R. R. Co. v. Hansford*, 241.)

19. **EVIDENCE—MEMORANDA OF PAYMENTS TO DECEDENT.**—Private memoranda of payments made to a decedent are inadmissible in a suit by the administrator, since the law will not permit a party to make a memorandum of a fact and introduce it as evidence of that fact when he is by statute denied the right to testify. (*Post v. Kenerson*, 948.)

20. **EVIDENCE—ACCOUNT-BOOKS—TEST.**—The manner of keeping accounts and their purpose, rather than the form of the books themselves, is the important consideration in determining whether they are entitled to be received as independent evidence. (*Post v. Kenerson*, 948.)

21. **EVIDENCE—ORIGINAL ENTRIES.—MERE PRIVATE MEMORANDA** cannot be received as independent evidence without proof that they were made as original entries. (*Post v. Kenerson*, 948.)

22. EVIDENCE.—PRIVATE MEMORANDA can only be referred to by a witness to refresh his recollection of what transpired, when they were made at the time of or soon after the transaction. (Post v. Kenerson, 948.)

23. EVIDENCE—ACCOUNT-BOOKS—INDEPENDENT EVIDENCE.—Account-books kept by a defendant, in which entries, are honestly made in the usual course of his business, and which include credits for goods received and charges for drafts accepted, are admissible as independent evidence of the fact of the acceptance of such drafts. (Post v. Kenerson, 948.)

24. EVIDENCE—PROOF OF FACT BY NOTORIETY.—The existence of a fact cannot be proved by reputation or notoriety, but if the fact is otherwise established, general notoriety in the neighborhood may be proved as competent evidence to charge a resident in that vicinity with knowledge of it. (Tennessee etc. R. R. Co., v. Linn, 108.)

25. EVIDENCE—REMOTENESS—APPEAL.—The question whether evidence offered is too remote from the transaction to be admissible is one for the trial court to determine, and will not ordinarily be revised on appeal. (State v. Doherty, 951.)

26. EVIDENCE—REVENUE STAMPS—UNSTAMPED INSTRUMENTS.—The fact that a deed or other instrument has no internal revenue stamp upon it, or that it has not the amount of such stamps upon it required by the United States statute, does not render it inadmissible nor affect its force as evidence in the state courts. (Insurance Cos. v. Estes, 892.)

27. EVIDENCE—REVENUE STAMPS.—Congress has no power to provide for the exclusion of instruments as evidence in state courts for want of internal revenue stamps required by United States statute to be affixed thereto. (Insurance Cos. v. Estes, 892.)

28. EVIDENCE—ABSENCE OF REVENUE STAMPS.—Although the amount of United States internal revenue stamps required by law is not placed upon a deed or other instrument, it is nevertheless admissible in evidence in the state courts. (Kennedy v. Roundtree, 841.)

See Letters; Witnesses.

EXECUTION.

1. EXECUTION—WHEN NOT AMENDABLE AND THEREFORE VOID.—THE SUBSCRIPTION of the clerk of the court is essential to a valid execution. Hence, if there is no such subscription, as where the writ is issued in the name of an ex-clerk instead of that of the incumbent, the execution is not amendable, as the seal of the court is insufficient to authenticate it. (O'Donnell v. Merguire, 389.)

2. EXECUTION—WANT OF DIRECTION.—The fact that an execution, when issued by a justice of the peace, is not directed to any officer, does not render it void. Such defect is a matter of form, subject to amendment. (Johnson v. Whitfield, 196.)

3. EXECUTION—TAKING ADVANTAGE OF DEFECTS IN.—The claimant, in an action to try the right of property levied on, cannot take advantage of a defect in an execution, which renders it voidable. (Johnson v. Whitfield, 196.)

4. EXECUTIONS—LEVY, SUFFICIENCY OF.—Memorandum of a levy under execution made on a separate piece of paper, and not attached to the execution, but placed with it in the proper office, is sufficient compliance with the statute to constitute a levy. (Kennedy v. Roundtree, 841.)

5. DEFINITION—BONA FIDE PURCHASER.—A JUDGMENT CREDITOR does not, by the levy of an execution, put himself in the attitude of a bona fide purchaser. (*Jones v. Chenault*, 211.)

See Appeal, 17; Constables; Husband and Wife, 4.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—PLEDGE OF PROPERTY OF ESTATE.—One of several executors may transfer personal property of the decedent, by way of sale or pledge for value. (*Schell v. Deperven*, 820.)

2. EXECUTORS AND ADMINISTRATORS—SALE OR PLEDGE OF DECEDENT'S PROPERTY.—If a coexecutor sells or pledges the personalty of the decedent, in fraud of the estate, to one who has no notice of the fraud, and acts in good faith, the transferee acquires good title to the property, in the absence of facts sufficient to put him on inquiry. (*Schell v. Deperven*, 820.)

3. EXECUTORS AND ADMINISTRATORS—PLEDGE OF PROPERTY—FRAUD—NOTICE.—If a coexecutor who has the active management of the estate, and who bears a good business and financial reputation, borrows money for the estate in the course of administration, of a person who does not know that the borrower is a coexecutor, or of any fraudulent intent on the part of the latter, who represents that the loan is for the benefit of the estate, and who pledges certain stock as security for the loan, and afterward transfers it to the lender, the facts are not sufficient to put the latter on inquiry and prevent him from acquiring good title to the stock. (*Schell v. Deperven*, 820.)

4. EXECUTORS AND ADMINISTRATORS—PLEDGE OF PROPERTY OF ESTATE—FRAUD—NOTICE.—The fact that personalty fraudulently pledged by a coexecutor, without knowledge by the pledgee of the fraud, is specifically bequeathed to the executor as trustee, does not impose a greater duty of making inquiry on such pledgee to prevent him from being charged with constructive notice of the fraud, than if the property was a simple asset of the estate. (*Schell v. Deperven*, 820.)

5. ADMINISTRATOR'S SALES—COLLATERAL ATTACK UPON.—A petition by an administrator to the probate court for the sale of lands of his intestate to pay debts is essentially a proceeding in rem, and after jurisdiction has attached in such proceeding, the decree of the court cannot be collaterally attacked for errors and irregularities subsequently occurring in such proceedings. Hence a failure to make an heir, whether adult or infant, a party to the proceeding is immaterial, and does not render the decree or sale open to collateral attack, although such error may work a reversal on direct appeal. (*Neville v. Kenney*, 230.)

6. ADMINISTRATOR'S SALE—COLLATERAL ATTACK SHOWING ABSENCE OF NECESSITY FOR.—While it may be true, as matter of fact, that no debts exist against the estate at the time of filing a petition by an administrator to the probate court for the sale of lands of his intestate to pay debts, for which such lands could be decreed to be sold, still, upon collateral attack, the existence or nonexistence of debts as a fact is not the proper inquiry in determining whether the jurisdiction of the court has attached. This question must be determined from the face of the record, consisting of the petition and decree based thereon, and if nothing appears upon the face of the record showing when the intestate died, nor how long the administration has been pending, it must be presumed upon such collateral attack that the debts alleged in such

petition accrued before the death of the intestate. (Neville v. Kenney, 230.)

7. ADMINISTRATOR'S SALES—JURISDICTION TO ORDER, WHEN ESTABLISHED.—The filing of a petition by the administrator for the sale of the lands of the intestate to pay debts, averring jurisdictional facts, confers jurisdiction upon the court, and the essential jurisdictional averments are the existence of debts of the estate and the insufficiency of personal property to pay them. The jurisdiction is not acquired by any order or decree of the court, but it attaches upon the filing of a proper petition by the proper party, and after jurisdiction has thus attached, and the court proceeds to a decree, although erroneous in the adjudication of the facts, the jurisdiction remains, unless it appears upon the face of the decree that in the adjudication of the facts the court ascertained some jurisdictional fact to be wanting. (Neville v. Kenney, 230.)

8. ADMINISTRATOR'S SALES.—JUDICIAL KNOWLEDGE of fact is but a rule of evidence dispensing with the necessity of offering evidence of such fact, and such knowledge can no more affect the jurisdiction of the court upon the filing of a proper petition by the proper party for the sale of lands of an intestate to pay debts, than the independent knowledge of the judge of the court of the nonexistence of the alleged indebtedness. (Neville v. Kenney, 230.)

9. ADMINISTRATOR'S SALES—ALLEGATIONS OF INDEBTEDNESS.—In averring the indebtedness of an estate in a petition to sell lands of an intestate to pay debts, it is not necessary to specify such debts nor is any particular form of averment required. It is sufficient to allege in general terms the existence of the debts of the estate. (Neville v. Kenney, 230.)

10. EXECUTORS AND ADMINISTRATORS—SALE OF PROPERTY MAY BE ORDERED, WHEN.—A court is authorized to order a sale of a decedent's property when it is necessary "to pay the debts, expenses, or charges of administration," and this refers not only to accrued debts, expenses, or charges, but to those to accrue. Hence, a sale may be ordered when necessary to meet such prospective charges or expenses, though there are no debts or expenses of administration accrued and unpaid. (Estate of Freud, 407.)

11. EXECUTORS AND ADMINISTRATORS—POWER TO PRESERVE PROPERTY—PAYMENT OF LIENS.—An executor or administrator may do whatever is necessary for the preservation of the property of the estate, subject to the contingency of the expense being disallowed by the court, and the specific character of the act done is altogether immaterial. He has power, therefore, to preserve the property by paying off liens existing on it, when necessary for the purpose. (Estate of Freud, 407.)

12. EXECUTORS AND ADMINISTRATORS—POWER TO REDEEM MORTGAGED PROPERTY.—An executor or administrator has power to use money in his hands for the purpose of redeeming property of the estate from a mortgage lien existing on it, and a court is authorized to order a sale for the purpose of redeeming the mortgaged premises from the lien, as it may justly regard the amount necessary for that purpose as a legitimate prospective charge or expense of administration. (Estate of Freud, 407.)

13. EXECUTORS AND ADMINISTRATORS—REDEMPTION BY DEVISEE, AND REDEMPTION AFTER SALE.—When a debt was contracted by a decedent in his lifetime, and a mortgage given on his property, which mortgage is foreclosed and the property sold during the course of administration on the estate,

a redemption by the successor in interest of one of the devisees simply terminates the effect of the sale, thus restoring the property to the estate, but reviving the lien of the mortgage for the benefit of the party redeeming, who acquires no title but an equitable lien only, by subrogation to the lien of the mortgagee. Hence, in a subsequent proceeding by an administratrix to make redemption and to charge the expense to the estate, it is still the lien of the original mortgage from which redemption is to be made. (Estate of Freud, 407.)

14. EXECUTORS AND ADMINISTRATORS—SETTLEMENT OF ACCOUNT—CUTTING DOWN FAMILY ALLOWANCE.—In settling the account of an administratrix, the question whether a credit made to her as widow for family allowance should be further cut down by reason of her delay in closing the estate is a question for the lower court to determine, and its decision thereon will not be disturbed if no sufficient reason appears therefor. (Estate of Freud, 407.)

15. EXECUTORS AND ADMINISTRATORS—MORTGAGE TO PAY OFF LIENS MAY BE ORDERED, WHEN.—A superior court has clear authority to order a mortgage for the purpose of paying off liens on the real property of a decedent's estate, and will not, in making such order, consider the interest of one who claims the land adversely to the estate. (Estate of Freud, 407.)

16. ADMINISTRATOR'S DEBT TO INTESTATE—EXTINGUISHMENT OF.—When letters are granted to an administrator who owed his intestate at the time of the latter's death, the debt is thereby extinguished, and becomes money in his hands, for which he and his sureties are accountable, without reference to his solvency or insolvency. (Arnold v. Arnold, 199.)

17. EXECUTORS AND ADMINISTRATORS—PRESUMPTION OF PAYMENT OF NOTE.—When a debtor is the administrator of his creditor's estate, the doctrine of presumption of payment, in cases where a note is found in possession of the maker, free from circumstances calculated to excite suspicion, has no application. (Arnold v. Arnold, 199.)

18. EXECUTORS AND ADMINISTRATORS—POSSESSION OF NOTES OWING BY THEM TO INTESTATES—PRESUMPTION—BURDEN OF PROOF—ASSETS.—When an administrator has possession of notes executed by him to his intestate, the presumption is that they are assets of the estate and that he has money to pay them. He must, therefore, bear the burden of showing that they were not binding, subsisting, obligations upon him at the time of his intestate's death, and, consequently, were never assets in his hands. (Arnold v. Arnold, 199.)

19. STATUTE OF LIMITATIONS—CLAIMS AGAINST ESTATE OF DECEDENT.—A statute of limitations requiring claims against an estate to be filed within a specified time, begins to run from the giving of notice by the executor, and where no proof is offered that such notice was given, it cannot be presumed that a claim is barred. (Easton v. Somerville, 502.)

20. STATUTE OF LIMITATIONS—ESTATES OF DECEDENTS—PLEADING.—In a suit against the estate of a decedent, the bar of the statute of limitations should be pleaded, in order to be available as a defense. (Easton v. Somerville, 502.)

21. ADMINISTRATORS—FOREIGN—EXTRATERRITORIAL AUTHORITY OF.—Letters of administration, granted by a foreign state, have no extraterritorial operation, and do not, as a matter of right, confer title to, or authority over, personal assets found

without the jurisdiction from which the grant is derived. (Grayson v. Robertson, 80.)

22. ADMINISTRATORS—FOREIGN—RIGHT TO SUE.—In the absence of statute, a personal representative, as such, has not the capacity to sue for the recovery of assets belonging to the estate of his decedent in any other state or country than that from which the letters were derived. (Grayson v. Robertson, 80.)

23. ADMINISTRATORS—FOREIGN—ANCILLARY.—In order to collect and administer assets of an estate located in different states, there must be ancillary administrations in the different jurisdictions in which such assets may be found, such administrations, when granted, drawing to them the title to, and immediate right to the possession of, the assets, although the residuum, after the satisfaction of claims of residents, goes to the domiciliary administration for distribution. (Grayson v. Robertson, 80.)

24. ADMINISTRATORS—FOREIGN—STATUTORY RIGHT TO SUE—ANCILLARY ADMINISTRATION.—Under a statute giving to foreign administrators the right to sue for and recover assets belonging to the estate, the right thus conferred may be defeated by the appointment of a personal representative in the state where the assets are situated before the foreign administrator has reduced them to possession. (Grayson v. Robertson, 80.)

25. ADMINISTRATORS—FOREIGN AND ANCILLARY.—Upon the appointment of an ancillary administrator of the estate of a nonresident decedent, the title to all personal assets in the state of his appointment vests in such appointee, and he is clothed with all powers incident to the administration of such assets. His powers are exclusive, leaving to the foreign and domiciliary administrator only the right to receive the residuum of the estate upon the final settlement of the ancillary administration. (Grayson v. Robertson, 80.)

26. ADMINISTRATORS—FOREIGN—RIGHTS OVER CORPORATE STOCK OF DECEDENT.—Under a statute giving to foreign administrators the right to transfer, and receive dividends upon, shares of stock owned by their decedents, such power is limited to transferring stock and receiving dividends thereon, and confers no right to receive from a building and loan association the withdrawal value of decedent's shares, and all power conferred by such statute is defeated by the appointment of an ancillary administrator. (Grayson v. Robertson, 80.)

27. ADMINISTRATORS—FOREIGN—STOCK IN BUILDING AND LOAN ASSOCIATION—RECOVERY OF WITHDRAWAL VALUE.—Where a decedent owns shares of stock in a foreign building and loan association, and the domiciliary administratrix increases the withdrawal value of such shares by payments made by her after her appointment, and then files the stock with the association for withdrawal, surrendering the certificate, upon the promise of the association to pay her the withdrawal value, such acts merely fix the amount which the corporation owes to the estate, and do not constitute a novation or merger of the rights of the estate in any contract made by the administratrix, entitling her to recover the withdrawal value of the shares, as against an ancillary administrator appointed in the state where such corporation is organized and before any payment has been made. (Grayson v. Robertson, 80.)

28. ADMINISTRATION—CORPORATE STOCK—SITUS.—For the purposes of administration, the situs of a certificate of stock of a corporation owned by a decedent is in the state where the cor-

poration was organized and has its principal place of business, then it is the situs of the corporation, and not the domicile of the holder of the certificate, that determines. (Grayson v. Robertson, 80.)

29. SURETIES UPON AN ADMINISTRATOR'S BOND are bound by a decree against their principal to the same extent that he is bound. (Crook v. Newborg, 190.)

See Cemeteries, 2; Husband and Wife, 5, 10.

EXEMPTIONS.

EXEMPTIONS—RIGHT OF CHILDREN OF ABSENT DEBTOR TO.—If the head of a family is absent as an absconding debtor, but has left personal property in the possession of his minor children, it must be presumed that he is only temporarily absent, and that he intends to return. His children, by their next friend, may claim his exemptions. It is immaterial in such case that the exemptions are asked for the children themselves, instead of in behalf of such debtor. (White v. Swann, 282.)

EXPERT EVIDENCE.

See Witnesses, 13, 14.

FELLOW-SERVANTS.

See Master and Servant, 3, 4.

FIXTURES.

1. **FIXTURES—CONDITIONAL SALE—PURCHASER WITHOUT NOTICE.**—A vendor, who makes a conditional sale of personal property to one who attaches it to his real estate in such a manner as to render it a fixture, has no rights in such personal property as against an innocent purchaser of the realty for value. (Thompson v. Smith, 541.)

2. **FIXTURES.—WAGON SCALES,** resting on a foundation of stone and mortar, within which the platform hung, the supporting rods entering an office building through its walls and floor, and there connected with the scale beam, such scales being intended for permanent use in connection with particular real estate, are fixtures. (Thompson v. Smith, 541.)

3. **FIXTURES—TEST.**—To constitute a fixture there must be actual annexation to the realty or something appurtenant thereto, application to the use or purpose to which that part of the realty with which it is connected is appropriated, and the intention of the party making the annexation to make a permanent accession to the freehold. (Thompson v. Smith, 541.)

FOREIGN STATUTE.

See Evidence, 7.

FORMER ACQUITTAL.

See Judgments, 20.

FRAUD AND DECEIT.

1. **FRAUD AND DECEIT—ELECTION OF REMEDIES.**—A person who is induced to purchase property by deceit and fraud has an election of remedies. He may rescind the contract, and to do this

he must return, or offer to return, what he has received, or he may affirm the contract and sue for damages, and in the latter event he need not return, nor offer to return, what he has received under the contract. (Binghampton Trust Co. v. Auten, 295.)

2. FRAUD AND DECEIT—DAMAGES—OFFER TO RETURN PROPERTY.—A person induced to buy worthless notes through the fraud and deceit of the seller in making representations as to the maker's solvency may maintain an action to recover for such fraud, without returning such notes. (Binghampton Trust Co. v. Auten, 295.)

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES.—A VOLUNTARY CONVEYANCE by a debtor is, in law, fraudulent and void per se as to existing creditors, irrespective of the debtor's intention. (Lehman v. Gunn, 159.)

2. FRAUDULENT CONVEYANCES.—JUDGMENT CREDITORS MAY, WITHOUT ISSUANCE OF EXECUTION, or the return of an execution nulla bona, maintain a bill to subject to the payment of their debts any property fraudulently transferred, or attempted to be fraudulently transferred, by their debtor. (Henderson v. Farley, Nat. Bank, 140.)

3. FRAUDULENT CONVEYANCES.—JUDGMENT CREDITORS MAY PURSUE PROPERTY fraudulently transferred by their debtor, although he has other assets out of which they might enforce the collection of his debts, and of necessity the solvency or insolvency of the debtor is of no consequence. (Henderson v. Farley Nat. Bank, 140.)

4. FRAUDULENT CONVEYANCES—BILL TO SET ASIDE—MULTIFARIOUSNESS.—A bill in equity by a creditor, seeking to vacate several conveyances of the debtor's property as fraudulent, and to subject the property so conveyed to the satisfaction of his demand, is not multifarious because the several grantees, who are joined as parties defendant, acquired different portions of the property under separate and distinct conveyances executed at different times, and there is no allegation that these several sales and conveyances had any actual connection with one another in any way, either in fact or intent. (Henderson v. Farley Nat. Bank, 140.)

5. FRAUDULENT CONVEYANCES—BILL TO SET ASIDE—VERIFICATION—DISCOVERY.—A bill by a creditor seeking to set aside as fraudulent a conveyance of his property by the debtor, and to subject such property to the payment of his debt, and praying for a discovery as to any other property owned by such debtor, is not demurrable because not verified. The discovery asked is merely incidental to the relief sought. (Henderson v. Farley Nat. Bank, 140.)

6. FRAUDULENT CONVEYANCES—ACCOUNTING AGAINST PARTNERSHIP.—If a bill by a creditor to set aside fraudulent conveyances by his debtor and to subject to the payment of his debt the property owned by the debtor alleges that such debtor is a member of a partnership and that, for the purpose of hindering, delaying and defrauding his creditors, he has sold his interest in such partnership business to his copartner, who with guilty knowledge, and to aid such debtor in his intent has purchased such property, a special prayer in such bill for relief against the partnership for an accounting and settlement thereof, and that the interest of the debtor therein be ascertained and applied to the payment of the debt, does not render the bill subject to demurrer, since

the creditor is entitled to such relief upon proof of the allegation in the bill. (Henderson v. Farley Nat. Bank, 140.)

See Homesteads, 4; Insurance, 7-9.

FUTURES.

See Gambling Contracts, 5.

GAMBLING CONTRACT.

1. GAMBLING CONTRACTS—SALE OF SLOT MACHINES.—If the vendor of slot machines to be used as gambling devices goes beyond the act and purpose of making a sale, and in making it actively and purposely participates in the promotion of the illegal use, he becomes particeps criminis, and cannot recover upon the contract of sale, nor can the innocent holder for value of notes given for the purchase price of such machines under such contract of sale recover thereon. (Kuhl v. Gally Universal Press Co., 135.)

2. GAMBLING CONTRACTS, though not immediately involving a wager, are void as against public policy. (Kuhl v. Gally Universal Press Co., 135.)

3. GAMBLING CONTRACTS—RENEWAL NOTES.—If notes secured by mortgage, given for the purchase price of slot machines are void, because such sale constitutes an illegal gambling contract, and are subsequently surrendered, and new notes secured by mortgage are given in lieu of the originals, the new notes are also illegal and void, and subject to the same defenses as the original notes. (Kuhl v. Gally Universal Press Co., 135.)

4. GAMBLING CONTRACTS—JURISDICTION OF EQUITY TO RELIEVE AGAINST.—If a statute extends the jurisdiction of equity "to all cases founded on a gambling contract so far as to sustain a bill of discovery and grant relief," and a bill is filed to foreclose a mortgage given to secure notes founded on a gambling contract, the maker thereof is entitled to maintain a cross-bill to have such notes and mortgage declared void and unenforceable. (Kuhl v. Gally Universal Press Co., 135.)

5. CONTRACTS—GAMBLING—FUTURES.—A contract for the future purchase of goods is valid, though the vendor neither has the goods nor has contracted for their purchase, and expects to acquire them only by a future purchase, unless it is apparent that no purchase and delivery were intended, but that the transaction should be closed up on the basis of the market value of the goods at the date of delivery. (Western Union Tel. Co. v. Chamblee, 89.)

GARNISHMENT.

See Attachment and Garnishment.

GUARANTY.

SURETYSHIP AND GUARANTY—NOTICE OF ACCEPTANCE.—If an offer by a person is to guarantee a debt for which another is primarily liable in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor, but the creditor must notify him of his acceptance of the offer, or of his intention to act upon it, and the guarantor is not bound to inquire as to the acceptance of his proposal. (Gano v. Farmers' Bank, 596.)

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—INVESTMENT OF FUNDS.—Under the statutes of Iowa a guardian cannot loan the money of his ward, lease his land, or invest his funds without an order of court, and an investment made without an order of the probate court is voidable until approved by the proper court. (*Easton v. Somerville*, 502.)

2. GUARDIAN AND WARD—RECOVERY OF WARD'S ESTATE—LACHES.—A delay of three years is not such laches as will estop the guardian of an infant ward from recovering the ward's property from the estate of her former guardian, where the decedent's estate is solvent, no prejudice has resulted by reason of the delay, and there has been no change in the relations of the parties. (*Easton v. Somerville*, 502.)

3. GUARDIAN AND WARD—RECOVERY OF WARD'S ESTATE—ESTOPPEL.—The guardian of an infant ward is not estopped from suing to recover his ward's property which had been improperly invested by her former guardian, where in the meantime the position of the defendants has not been changed, and they have done no act that would result in their injury if the guardian should recover, and where the guardian had not, after acquiring knowledge of the facts, done any act tending to show an intent to ratify the transaction. (*Easton v. Somerville*, 502.)

4. GUARDIAN AND WARD—LIABILITY OF GUARDIAN—LACHES IN RECOVERING PROPERTY.—Mere delay on the part of a guardian in bringing an action to recover his ward's property does not give the ward a right of action against him, where no damage has resulted and a collectible judgment is eventually recovered. (*Easton v. Somerville*, 502.)

5. GUARDIAN AND WARD—ELECTION OF REMEDIES.—An action by a guardian against the executor of his ward's former guardian and one who has received trust funds belonging to the ward, for the conversion of such funds, does not constitute an election of remedies against either of the defendants, since the remedies are not inconsistent. (*Easton v. Somerville*, 502.)

6. ELECTION TO RATIFY TRANSACTION—EFFECT OF DELAY.—To constitute an election there must be knowledge of the facts and some decisive act tending to show an intent to ratify the transaction. Mere delay is not conclusive evidence of an election. (*Easton v. Somerville*, 502.)

7. STATUTE OF LIMITATIONS—WARD'S CLAIM AGAINST GUARDIAN'S ESTATE.—A statute requiring claims against an estate to be presented within a certain time does not apply to the claim of an infant ward against the estate of her guardian, where the claim arises out of an unauthorized investment of the ward's property, since such claim is contingent upon the ward's rejection of the investment upon becoming of age, and may never ripen into a legal claim against the guardian's estate. (*Easton v. Somerville*, 502.)

HABEAS CORPUS.

See Judgments, 26.

HEIRS.

See Contracts, 5, 6.

HIGHWAYS.

1. HIGHWAYS—VIEWERS' REPORT—"LEAST DAMAGE" IN LAYING OUT—ISSUE OF FACT.—When viewers appointed to lay out a public road over private property report that they have so laid out the road as to cause the "least damage," such fact is not issuable. Neither are the objectors entitled to a hearing upon the justice of the viewers' report. (Fanning v. Gilliland, 758.)

2. HIGHWAYS—ORDER ESTABLISHING ROAD—WHEN VALID.—If a petition to lay out a public road designates the exact route to be taken, the order establishing the road will not be disturbed, though the court directed the road to be located according to the petition, if the report of the viewers shows that the road so laid out was located so as to do the least damage to the land through which it passes. (Fanning v. Gilliland, 758.)

3. EMINENT DOMAIN—HIGHWAYS—TAKING PROPERTY FOR ROAD—JUST COMPENSATION.—An order of court declaring a road to be a public highway, and directing it to be opened on payment of the costs and damages assessed by the viewers, is not a taking of property without just compensation first assessed and tendered, though the costs and damages are not paid until after its entry. Under such an order, there is no appropriation of property, except upon the condition of the payment of costs and damages. (Fanning v. Gilliland, 758.)

4. EMINENT DOMAIN—PUBLIC ROAD—PUBLIC USE.—The taking of property for a public road is a taking for a public use. (Fanning v. Gilliland, 758.)

5. EMINENT DOMAIN—PUBLIC ROAD—DUE PROCESS OF LAW.—The laying out, over private property, of a road, which is a public way, open to all who may desire to use it, is not a taking of property without due process of law, though the road accommodates but a single family. (Fanning v. Gilliland, 758.)

6. HIGHWAYS—ANSWER IN PROCEEDINGS FOR, WHEN NOT ALLOWABLE.—Though a petition for the location and establishment of a highway avers that the petitioner's residence cannot be reached by any convenient public road, and that it is necessary for him and the public to have ingress and egress to and from such residence, no answer can be made thereto if the statute does not provide therefor, and if filed may be stricken out; and if the statute declares that upon the presentation of a verified petition the court must appoint viewers, such petition cannot be controverted. (Fanning v. Gilliland, 758.)

7. EMINENT DOMAIN—PRIVATE ROAD, WHEN A PUBLIC USE.—If, by a fair construction and operation of a statute, a road, when laid out, is in fact a public road, for the use of all who may desire to use it, the law is constitutional, though the road may have been applied and paid for, and kept in repair by, one for whose benefit it was primarily designed. (Fanning v. Gilliland, 758.)

HOMESTEADS.

1. HOMESTEADS—ABANDONMENT.—The owner of land who removes therefrom and makes application for and procures a loan thereon, by declaring in writing that the land is not his homestead, thereby abandons it as such. (Farmers' etc. Loan Assn. v. Jones, 280.)

2. HOMESTEADS.—ABANDONMENT of a homestead by a husband binds his wife also. (Farmers' etc. Loan Assn. v. Jones, 280.)

3. **DEEDS—HOMESTEAD—JOINDER OF WIFE.**—A conveyance of the homestead not exceeding in value the statutory limit by a husband to his wife is void, unless she joins in and acknowledges the conveyance. (Shields v. Bush, 474.)

4. **HOMESTEADS—FRAUDULENT CONVEYANCE OF.**—A CONVEYANCE BY A DEBTOR of his homestead is not fraudulent as to creditors who could not have subjected it by legal process to the payment of debts. (Cox v. Birmingham Drygoods Co., 238.)

5. **HOMESTEADS—EQUITY.**—UNSECURED CREDITORS of a decedent have no right or equity to compel a mortgagee of the homestead to exhaust such homestead, set apart to the widow and children, before he can claim any part of the assets of the estate as applicable to his mortgage. (Pearson v. Pearson, 846.)

HOMICIDE

1. **MURDER—PREMEDITATION.**—If one accused of murder voluntarily confesses that the deceased first attacked him with an ax, but, failing to strike him, walked away a distance of from sixty to seventy-five feet, when the accused approached him stealthily from behind, and, seizing the ax from his hands, struck him, inflicting a mortal wound, this shows sufficient premeditation and deliberation to sustain a verdict of murder in the first degree. (King v. State, 307.)

2. **MURDER—PREMEDITATION—DELIBERATION.**—To constitute the killing of a human being murder in the first degree, there must be a specific intent to kill formed in the mind of the slayer before the killing is done; but it is not necessary that such intent be conceived for any particular length of time before the killing, as it may be formed and deliberately executed in a very brief space of time, as in a moment, and the law fixes no time in which such intent must be formed and put in action; but leaves its existence as a fact to be determined by the jury from the evidence. (King v. State, 307.)

3. **HOMICIDE—PREMEDITATION—EVIDENCE OF PREPARATION.**—In a prosecution for murder, evidence which shows any fact which constitutes preparation for the act is relevant. Hence testimony indicating that the accused, the night before the homicide, purchased a revolver and cartridges is admissible as tending to show that the homicide was premeditated. (State v. Doherty, 951.)

4. **HOMICIDE—PREMEDITATION—EVIDENCE TO REBUT.** Where the defendant, the night before the homicide, purchased the revolver with which he did the killing, evidence that some five months before he had a worthless revolver, which he had thrown away, is not relevant as tending to show that it was nothing new for him to have one, as bearing on the question of premeditation. (State v. Doherty, 951.)

5. **HOMICIDE—SELF-DEFENSE—EVIDENCE.**—In a prosecution for murder against one who purchased a revolver the night before the homicide, where the defense is that the revolver was purchased for the general purpose of self-protection against others as well as the deceased, testimony offered to show that threats of personal violence had been made against the accused by others is properly excluded, where there is no offer to show the time when such threats were made. (State v. Doherty, 951.)

6. **HOMICIDE—TRIAL—RIGHT TO EXAMINE QUESTION BEFORE IT IS PUT.**—In a prosecution for murder, counsel for the

defendant have no legal right to examine a question asked by the prosecution before it is put. (State v. Doherty, 951.)

7. **HOMICIDE—INTENT—TESTIMONY OF ACCUSED.**—The failure of an accused, who testifies in his own behalf, to testify concerning his intent immediately preceding the killing, where he has testified as to his intent just before that time, is a circumstance for the jury to consider in determining the degree of the crime which he has committed. (State v. Doherty, 951.)

8. **HOMICIDE—FEAR AND COWARDICE—HEAT OF BLOOD.**—Fear, fright, nervousness, and cowardice are placed on the same plane with anger and heat of blood, so far as they relate to the commission of a homicide. (State v. Doherty, 951.)

9. **HOMICIDE—MANSLAUGHTER—FEAR AND EXCITEMENT.**—If the drawing and use of a revolver by an accused is an afterthought subsequent to the encounter with the deceased, and wholly due to the then nervousness, excitement, fear, anger, and heat of blood of such accused, the offense is manslaughter, and not murder. (State v. Doherty, 951.)

10. **HOMICIDE—MANSLAUGHTER—JUSTIFICATION FOR FEAR.**—If, at the time of the commission of a homicide, the elements of fear, excitement, and nervousness are without such provocation as the law regards as sufficient justification for anger and heat of blood, the killing is murder, and not manslaughter. (State v. Doherty, 951.)

11. **HOMICIDE—JUSTIFIABLE—SELF-DEFENSE—FEAR.** Where an accused, who sees another approaching him in a hostile attitude, and has reason to believe that such other intends to kill him or to do him great bodily harm, shoots such person through fear, nervousness, excitement, and fright, it reasonably appearing to him that he could defend himself in no other way, the homicide is justifiable as being done in self-defense. (State v. Doherty, 951.)

12. **HOMICIDE—MUTUAL COMBAT—FIRST BLOW.**—In cases of mutual combat it is not important to the character of the killing which party gave the first blow. (State v. Doherty, 951.)

13. **HOMICIDE—MUTUAL COMBAT—INTENT.**—If one draws his sword before the other has attempted to draw his and thrusts his antagonist through the body, whereby he dies, it is murder, for it shows the purpose of killing in the first instance. (State v. Doherty, 951.)

14. **HOMICIDE—INSTRUCTION—SUPERIOR STRENGTH.**—Upon a trial for murder, it is not error to refuse to state the questions of superior strength and health of one and disease and weakness of the other in a charge which refers to the use of a revolver by the accused. (State v. Doherty, 951.)

15. **HOMICIDE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—INSANITY.**—In order to grant a new trial to one who has been convicted of murder, on the ground that since the trial evidence has been discovered which shows that the defendant was not guilty by reason of insanity, the newly discovered evidence must be of such a character as to leave a reasonable doubt of the defendant's guilt when taken in connection with all the rest of the testimony. (State v. Doherty, 951.)

16. **HOMICIDE FROM EXPOSURE OR NEGLECT.**—If the exposure or neglect of an infant or other dependent person, resulting in death, is an act of mere carelessness, wherein danger to life does not clearly appear, the homicide is only manslaughter, but if such exposure or neglect is of a dangerous kind, it is murder. (Pallis v. State, 106.)

17. HOMICIDE—EVIDENCE OF ANOTHER CRIME.—On the trial for the murder of a policeman, if it appears that the accused had threatened to kill the deceased, evidence of a burglary committed by the former at another place and prior to the killing, and connected with the threat, is admissible to show that the killing was intentional, willful, and premeditated, and also to show why the deceased was at the place of the killing. (Commonwealth v. Major, 803.)

18. HOMICIDE—EVIDENCE OF ANOTHER CRIME.—If, on a trial for the murder of a policeman, it appears that the accused, after committing a burglary at one place, went to another house, where he was engaged in committing a second burglary, at the time he shot the deceased, who had followed him from the scene of the first burglary, evidence of the second burglary is admissible, no matter whether the deceased knew of it or not. (Commonwealth v. Major, 803.)

19. HOMICIDE—EXECUTION OF COMMON PURPOSE.—If murder is the probable consequence of a crime in which the accused and his companions were engaged, the accused is chargeable with the killing, even though it was done by another in the execution of the common purpose. (Commonwealth v. Major, 803.)

20. HOMICIDE—INDICTMENT—TIME.—If an indictment charges murder on a day named, it may be shown that the deceased was shot on that day and that he died of the wound then received four days thereafter. (Commonwealth v. Major, 803.)

21. HOMICIDE—TRIAL—INSTRUCTIONS.—On a trial for murder, an instruction to the jury that "you will perceive that we have that which demands and requires the admission of counsel for the defendant that this man is guilty of at least murder of the second degree," is not error, if there are facts proved by the commonwealth, undisputed, conceded, admitted, and sworn to by the defendant himself, from which the law sanctioned but one conclusion, that the prisoner was guilty at least of murder of the second degree. (Commonwealth v. McMurray, 787.)

22. HOMICIDE.—ADMISSIONS BY COUNSEL for a person on trial for murder are evidence against him, when made in open court, and may be used by the jury as a basis for a verdict. (Commonwealth v. McMurray, 787.)

23. HOMICIDE—DEGREE OF CRIME—INSTRUCTIONS.—If, on a trial for homicide, the undisputed evidence establishes murder, and the defense is intoxication, and the jury is instructed in the most explicit terms that there are four verdicts, any one of which it might render, namely, not guilty, or guilty of manslaughter, of murder of the second degree, or of the first degree, and in the choice among these four they are left entirely free to exercise their own judgment, a verdict of guilty of murder in the first degree cannot be disturbed on appeal. (Commonwealth v. McMurray, 787.)

24. HOMICIDE—TRIAL—INSTRUCTIONS.—If, on a trial for murder, a request for instructions may tend to lead or confirm the jury in the popular error that a drunken man is not responsible for crime, the court may qualify its answer to such request so as to remove such impression, and may call the attention of the jury to threats made by the accused, his repeatedly seeking the deceased, and his continued drinking up to the killing, as consistent with the view that he had formed a design to kill and was nerving himself up to its execution. (Commonwealth v. McMurray, 787.)

25. HOMICIDE—EVIDENCE—INTOXICATION.—If, on a trial for murder, the defense has introduced evidence of the intoxica-

tion of the accused, the prosecution may, in rebuttal, show his condition as to sobriety previous to the killing, although the defense has already given the same, or closely similar, evidence on the same point. (*Commonwealth v. McMurray*, 787.)

HOTEL.

See Railroads, 1.

HOUSE OF ILL-FAME.

1. **HOUSE OF ILL-FAME—CORROBORATION OF ACCOMPLICE.**—The evidence of an accomplice of one charged with keeping a house of ill-fame, which consists in the use of a covered wagon, with which he traveled from place to place, is sufficiently corroborated by the defendant's admissions, and his apparent control of the wagon and team. (*State v. Chauvet*, 539.)

2. **HOUSE OF ILL-FAME.—A COVERED WAGON,** drawn from place to place, and used as a place of abode for human beings, where prostitution is carried on, is a house within the meaning of a statute prohibiting the keeping of a house of ill-fame (*State v. Chauvet*, 539.)

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—AGREEMENT FOR MAINTENANCE—PUBLIC POLICY.**—If a separation between a man and wife has been induced by his misconduct, a contract made prior to a decree of divorce obtained by her against him, whereby he agreed to pay her a certain amount each month for her maintenance, is not against public policy. (*Henderson v. Henderson*, 741.)

2. **HUSBAND AND WIFE—AGREEMENT BETWEEN, AS TO INVESTMENT AND AGENCY.**—If there is an understanding between a husband and his wife that she will invest her money in goods and that he will buy and sell the same for her as her agent, such an agreement and investment, whether known to the seller or not, is effective, as between the husband and his wife, to make the purchase her own and to vest in her the title to the goods. (*Jones v. Chenault*, 211.)

3. **HUSBAND AND WIFE—HER POWER TO CONTRACT WITH HIM AND TO ACQUIRE PROPERTY.**—Under the statute of Alabama, a married woman may make valid and binding agreements with her husband, and she has full capacity to acquire property. Its acquisition by her from persons other than the husband, when the consideration does not move from him, can work no fraud upon his creditors, for nothing is thereby withdrawn from his estate as in the case of a transfer of his property. (*Jones v. Chenault*, 211.)

4. **EXECUTION—TRIAL OF RIGHT OF PROPERTY—PROPER EVIDENCE.**—In trying the right of property in goods levied upon as the property of a husband, but which are claimed by his wife, the question as to whether the money used in the purchase thereof belonged to him or her is a material inquiry, and it is proper for her to show the source whence the money came. (*Jones v. Chenault*, 211.)

5. **HUSBAND AND WIFE—RECOVERY OF COMMUNITY PROPERTY FROM WIFE'S ADMINISTRATOR — PROPER FORUM.**—If money is deposited in bank by a wife in her own name, and falls, after her death, into the hands of her administrator, but is claimed by her husband as community property, he can

maintain an action in the superior court, outside of its probate department, to recover it. (Fennell v. Drinkhouse, 361.)

6. HUSBAND AND WIFE—RECOVERY OF COMMUNITY PROPERTY FROM WIFE'S ADMINISTRATOR.—When money deposited in bank by a wife in her own name after marriage falls, after her death, into the hands of her administrator, but is claimed by her husband as community property, an action by him to recover it is for money had and received to the use and benefit of the plaintiff. It is not a claim against the deceased, nor is it a suit against her estate. (Fennell v. Drinkhouse, 361.)

7. HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTION—BURDEN OF PROOF.—Money deposited in bank by a wife in her own name is presumed to be community property, and the burden is upon her representative to show that it was separate property. (Fennell v. Drinkhouse, 361.)

8. HUSBAND AND WIFE—COMMUNITY PROPERTY—EARNINGS OF WIFE.—Money earned by a wife while living with her husband is community property. (Fennell v. Drinkhouse, 361.)

9. HUSBAND AND WIFE—COMMUNITY PROPERTY—POSSESSION OF, AS AFFECTING THE SURVIVOR'S RIGHT.—A wife's possession of community property is the possession of her husband, and the survivor's right therein does not depend upon its possession prior to the death of the other spouse. (Fennell v. Drinkhouse, 361.)

10. LIMITATIONS OF ACTIONS—RECOVERY OF COMMUNITY PROPERTY FROM WIFE'S ADMINISTRATOR.—A husband's right of action to recover community property from the administrator of his deceased wife is not barred by the statute of limitations because of her custody of the property before her death. (Fennell v. Drinkhouse, 361.)

11. HUSBAND AND WIFE—EJECTMENT BY WIFE.—A wife may maintain ejectment against her husband to recover the possession of lands constituting her separate estate. It is immaterial that such lands were at one time occupied by him and her and their children as a homestead, or that the husband and children still reside thereon, or that he at the time of trial, and at all times, was willing for the wife to return to the homestead and occupy it jointly with him. (Cook v. Cook, 264.)

12. HUSBAND AND WIFE—EJECTMENT BY WIFE.—A wife having separated from her husband and having left her separate estate in his possession, is entitled to recover it from him as if he were a stranger. (Cook v. Cook, 264.)

See Deeds, 8, 13; Homesteads, 8.

IDEM SONANS.

IDEM SONANS.—The names "Hite" and "Hyde" are not idem sonans. (State v. Williams, 288.)

See Indictment, 2.

INDEPENDENT CONTRACTORS.

See Master and Servant, 1.

INDIANS.

See Adoption, 2; Descent, 1.

INDICTMENT.

1. INDICTMENT—TIME OF CRIME.—Except when time enters into the nature of an offense, it is not necessary to prove the

exact time laid in the indictment. Any other time may be shown upon the trial, if it is prior to the finding of the indictment, and within the period prescribed by the statute of limitations. (*Commonwealth v. Major*, 803.)

2. **IDEM SONANS—VARIANCE BETWEEN INDICTMENT AND PROOF.**—Under an indictment for unlawful cohabitation with a woman named "May Hite," proof that the accused unlawfully cohabited with a woman named "May Hyde" is a fatal variance. (*State v. Williams*, 288.)

See Homicide, 20.

INFANTS.

1. **ESTOPPEL AGAINST INFANTS—SALE OF LAND.—IN EQUITY** an infant will not be permitted to receive and retain that which forms the consideration for an invalid sale of his land, and at the same time be permitted to retake the property to the prejudice of those who have in good faith acted upon the transaction as valid. (*Hobbs v. Nashville etc. Ry. Co.*, 103.)

2. **ESTOPPEL AGAINST INFANTS—SALE OF LAND.—THE MERE RECEIPT OF THE CONSIDERATION** upon an invalid sale of land will not of itself estop an infant from asserting his right of election whether to affirm the sale or to make restitution and reclaim the property. (*Hobbs v. Nashville etc. Ry. Co.*, 103.)

3. **ESTOPPEL AGAINST INFANTS—CONDEMNATION OF LAND—RECEIPT OF MONEY BY GUARDIAN.**—A guardian has no authority to make or ratify an unauthorized disposition of the infant's lands. Hence in condemnation proceedings to acquire the lands of an infant, the receipt of the condemnation money by the guardian does not estop the infant from subsequently reclaiming his land. (*Hobbs v. Nashville etc. Ry. Co.*, 103.)

4. **INFANTS—RATIFICATION OF SALE OF LAND—CONDEMNATION PROCEEDINGS.**—If an infant upon becoming of age and without unfairness voluntarily receives and retains the money paid for his land in condemnation proceedings, with a full knowledge of the facts, the other party being in possession and no question of the statute of frauds arising, such action constitutes an election to treat the transaction as valid. (*Hobbs v. Nashville etc. Ry. Co.*, 103.)

5. **INFANTS—UNAUTHORIZED SALE OF LAND—RIGHT TO RETAKE LAND—RETURN OF MONEY.**—An infant who has recovered judgment in ejectment against one who has acquired his lands in invalid condemnation proceedings will, in equity, be required to return the money received as a condition to his right to enforce his judgment. (*Hobbs v. Nashville etc. Ry. Co.*, 103.)

INHERITANCE.

See Descent.

INJUNCTIONS.

See Judgment, 12.

INSANITY.

See Witnesses, 14.

INSTRUCTIONS.

1. TRIAL—INSTRUCTIONS, if abstract, are properly refused. *Morrissett v. Wood*, 127.)

2. INSTRUCTIONS—ABSTRACT QUESTION.—A court is not required to give an instruction upon an abstract question, there being no evidence in the case upon the point. (*State v. Doherty*, 951.)

3. TRIAL — INSTRUCTIONS — APPELLATE PRACTICE.—If the charge given by the trial court states to the jury the law applicable to the case, and one of the parties desires a more extended charge, he must embody his propositions in the form of requests to charge, otherwise he cannot complain of error in the charge given. (*Nohrden v. Northeastern R. R. Co.*, 826.)

4. JURY TRIAL—INSTRUCTIONS.—The judge is not bound to charge the jury in the exact language of the point, but may choose his own words, and if the point affirmed, without qualification, would be likely to give the jury an erroneous impression, it is the duty of the court to add such explanations or qualifications as will correct such tendency. (*Commonwealth v. McMurray*, 787.)

5. TRIAL—INSTRUCTIONS—POSSESSION.—It is not error to instruct the jury that "possession is nine points in the law," if such language is followed by legal definitions of presumptions arising from possession. (*Sutton v. Clark*, 848.)

6. TRIAL.—INSTRUCTIONS upon an issue in the case, which, though not supported by direct and positive evidence, is supported by circumstances sufficient to sustain the verdict, are not erroneous. (*Insurance Cos. v. Estes*, 892.)

7. INSTRUCTIONS—CONFLICT OF EVIDENCE.—A charge which assumes a fact as proved, where the evidence is conflicting, is bad. (*Bates v. Harte*, 186.)

See Appeal, 13.

INSURANCE.

1. INSURANCE—EFFECT OF UNDISCLOSED VENDOR'S LIEN.—The existence of an undisclosed vendor's lien upon insured property, and the commencement of proceedings, with the knowledge of the insured, to enforce it, does not avoid a policy of insurance containing a provision that "this entire policy shall be void if the interest of the insured be other than unconditional or sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if, with the knowledge of the insured, foreclosure proceedings be commenced with notice given of sale of any property covered by the policy by virtue of any mortgage or trust deed." (*Insurance Cos. v. Estes*, 892.)

2. FIRE INSURANCE—ASSIGNMENT FOR CREDITORS.—If an insured person makes a general assignment for the benefit of his creditors, the assignment makes such a change in the title and interest of the insured as will render the policy void, unless it is saved by estoppel or waiver. (*Northam v. Dutchess County etc. Ins. Co.*, 655.)

3. FIRE INSURANCE—CHANGE OF TITLE—WAIVER—ESTOPPEL.—When the subject of fire insurance has been assigned by the insured, before a loss, for the benefit of his creditors, and without the company's consent, indorsed upon or added to the policy, a waiver of its conditions as to change of title is not established by evidence that, after the assignment and before the fire, the insured notified the company's agent that the assignment

had been made; that the assignee wanted the insurance kept good and promised to pay a balance of premium due, but that he did not have the policy with him; that the agent replied: "I will see that the insurance is all right," and to the effect that the assignee should have the benefit of it; and that the remainder of the premium was not paid before the fire. Nor do such facts authorize the application of the doctrine of estoppel. (*Northam v. Dutchess County etc. Ins. Co.*, 655.)

4. **INSURANCE, LIFE—INCONTESTABILITY.**—If a life insurance policy provides that it is "issued and accepted subject to the benefits, provisions, and conditions on the second page hereof," made a part of the contract, and that "except as hereinbefore provided this policy shall be incontestable for any cause except misstatement of age," the policy cannot be contested on the ground of fraud in the application and medical examination preceding the issuance of the policy, such application and examination not being indorsed on the second page of the policy. (*Insurance Co. v. Fox*, 885.)

5. **INSURANCE, LIFE — INCONTESTABILITY — FRAUD.**—A condition in a life insurance policy that it shall be incontestable for fraud in the application therefor, or in the medical examination preceding it, is not void as against public policy. (*Insurance Co. v. Fox*, 885.)

6. **INSURANCE, LIFE—SUICIDE—STARVATION.**—If a policy of life insurance provides that it shall be void "if the insured should die by self-destruction, whether sane or insane," his beneficiary cannot recover if it is shown that voluntary starvation caused or hastened the insured's death, although he was at the time fatally ill with scurvy, which would have ultimately caused his death. (*Insurance Co. v. Fox*, 885.)

7. **FRAUDULENT CONVEYANCES—GIFT OF LIFE INSURANCE**—If an insolvent takes out a policy of insurance on his life, payable to beneficiaries therein named, the subject matter of the voluntary conveyance or gift is not the premium paid by the insured but the policy, or the insurance which it represents. Such a transfer is fraudulent and void, as to existing creditors, without regard to the intention of the insured, and the donor's interest in the insurance will be postponed to their claims and demands, whether the debtor purchased the insurance for cash or on credit. (*Lehman v. Gunn*, 159.)

8. **LIFE INSURANCE—CONTRACT OF—WHEN COMPLETE.** If a person has taken out a policy of insurance on his life, the first premium being divided into two parts, a cash premium and a premium loan, and it appeared that the insured has given his personal check for the cash premium and his note for the premium loan, that the agent has remitted out of his own funds the amount of the cash premium to his company, and that the policy has been delivered, the contract of purchase of insurance is complete, though the agent retains the check as a claim against the insured. A vested interest in the insurance arises to the beneficiary, subject to the conditions and stipulations of the contract. (*Lehman v. Gunn*, 159.)

9. **FRAUDULENT CONVEYANCES—GIFT OF LIFE INSURANCE—RIGHTS OF EXISTING CREDITORS.**—When a debtor takes out a policy of insurance on his life, payable to beneficiaries therein named, but paying the premium himself, the right of existing creditors to proceed against the fund created by the policy arises as soon as the insurance becomes due and payable, and cannot be defeated by the fact that an administrator of the debtor's estate

gratuitously pays, out of his own funds, a check given by the insured in payment of a cash premium, for the purpose of preventing it from being presented as a claim against the estate. (Lehman v. Gunn, 159.)

10. LIFE INSURANCE—TRUST FUND FOR BENEFIT OF CREDITORS—ACCOUNTING.—When a debtor insures his life for the benefit of others, paying the premiums out of his own funds, the insurance, upon his death, becomes a trust fund for existing creditors, and all who deal with it, with notice, may be required to account. (Lehman v. Gunn, 159.)

See Judgments, 6.

INTEREST.

INTEREST—PLACE OF PERFORMANCE REGULATES.—A note or bond made payable at a particular place, or which is expressly made with reference to the laws of a particular state, is governed in respect to its obligation as to interest by the law of the place so stipulated as the place of performance. (Hayes v. Southern Home etc. Assn., 216.)

See Usury.

INTOXICATION.

See Homicide, 25.

JOINT LIABILITY.

1. JOINT LIABILITY—TORT FEASORS—ACTION FOR MONEY HAD AND RECEIVED.—If one person wrongfully converts the property of another, the tort may be waived and an action for money had and received for the use and benefit of the plaintiff be sustained for the proceeds of the conversion; but where there are two or more joint tortfeasors, and the tort is waived, such an action cannot be sustained as to the tortfeasor who did not receive any benefit from the conversion. (Ward v. Hood, 205.)

2. ACTIONS—JOINT TORT FEASORS.—If two are sued jointly for a tort, and the evidence is not sufficient to hold one, there may be a discontinuance as to that one, and the trial may proceed as to the other. (Dutton v. Lansdowne Borough, 814.)

3. TRIAL—JOINT TORT FEASORS.—If two are sued jointly for a tort, and the case is given to the jury as against both, but the evidence fails to show that both were tortfeasors, it is error to permit a recovery against one or both. Such a case involves, not a mere misjoinder of parties, but a misjoinder of causes of action. (Dutton v. Lansdowne Borough, 814.)

JUDGES.

1. JUDGES — DISQUALIFICATION — RELATIONSHIP — PARTY OF RECORD.—A judge is disqualified, by reason of relationship, from determining a cause, if he is related within the fourth degree to any person interested in the judgment or decree, though the latter is not a party of record. (Crook v. Newborg, 190.)

2. JUDGES—DISQUALIFICATION—RELATIONSHIP—SURETY.—A probate judge is disqualified, by reason of relationship, from hearing and settling the account of an administrator, where the judge and a surety on the administrator's bond are first cousins. (Crook v. Newborg, 190.)

3. JUDGES — DISQUALIFICATION — DUTY TO CERTIFY.—When a judge knows that he is disqualified by reason of relationship, his duty is to refuse to hear the cause and to certify his disqualification to the proper officer, as required by statute, without waiting until the parties object to him. (Crook v. Newborg, 190)

See Mandamus, 3.

JUDGMENT.

1. JUDGMENT—ENTRY BY CLERK—VALIDITY.—A judgment, though in fact entered by the clerk, is, in consideration of law, the act and determination of the court, and is as valid as any other judgment. (Fred Miller Brew. Co. v. Capital Ins. Co., 529.)

2. JUDGMENT OF SISTER STATE—WHEN VALID.—A judgment of one state, rendered by a court having jurisdiction of the parties and the subject matter, although under a procedure peculiar to that state, if valid there, must be recognized in other states as binding on the parties thereto. (Fred Miller Brew. Co. v. Capital Ins. Co., 529.)

3. JUDGMENT — VALIDITY — SERVICE AND FILING OF COMPLAINT.—Under the statutes of Wisconsin, in a suit upon a contract for the payment of money only, service of summons confers jurisdiction upon the court to enter judgment against the defendant, and a judgment by default is valid though the complaint has not been served on the defendant and it was not filed with the clerk until the time judgment was entered. (Fred Miller Brew. Co. v. Capital Ins. Co., 529.)

4. JUDGMENT—SUIT BEGUN IN WRONG COUNTY.—A judgment rendered in the county where the action is commenced is valid, although the action is commenced in the wrong county, in the absence of a request by the defendant for a change of venue. (Fred Miller Brew. Co. v. Capital Ins. Co., 529.)

5. JUDGMENT — FOREIGN — PARTIES—COLLATERAL ATTACK.—In a suit upon a foreign judgment, advantage cannot be taken of the fact that in the original action all the proper parties were not before the court. (Fred Miller Brew. Co. v. Capital Ins. Co., 529.)

6. JUDGMENT—PARTIES TO SUIT—ACTION ON INSURANCE POLICY.—A MORTGAGEE is a proper party plaintiff in an action upon an insurance policy for the benefit of the mortgagee, and a judgment in favor of such mortgagee is valid, where both mortgagor and mortgagee had stipulated that the loss should be awarded to him. (Fred Miller Brew. Co. v. Capital Ins. Co., 529.)

7. JUDGMENTS—AMENDMENT NUNC PRO TUNC—COLLATERAL ATTACK.—The power resides in every court to correct and amend the entries on its minutes, nunc pro tunc, and no court can incidentally or collaterally question the verity of the record as amended. The remedy against an improper amendment is by appeal, or some other method of direct attack. (Ware v. Kent, 132.)

8. JUDGMENTS—AMENDMENT NUNC PRO TUNC.—The record evidence of the rendition of a judgment at a prior term, and of the failure of the clerk to make a proper entry thereof on the minutes of the court, supplies every fact necessary to the entry of a perfect judgment, and authorizes the entry thereof nunc pro tunc. (Ware v. Kent, 132.)

9. JUDGMENTS—AMENDMENT.—NOTICE TO THE OPPOSITE party is not necessary in order to enable the court to amend its judgment nunc pro tunc. (Ware v. Kent, 132.)

10. JUDGMENTS—AMENDED RECORD AS EVIDENCE.—If the effect of the amendment of a judgment nunc pro tunc is to substitute a perfect judgment entry for an imperfect entry made in the minutes of the court when the judgment was rendered, such amendment imparts regularity to the execution issued on the judgment imperfectly entered, and to all proceedings under it. (Ware v. Kent, 132.)

11. JUDGMENTS—MERGER—SISTER STATE.—A judgment of a court in any state is a merger of the cause of action in every part of the Union. (Gray v. Richmond Bicycle Co., 720.)

12. JUDGMENTS—FRAUDULENT—QUESTIONS FOR JURY.—Where the nonresident payees of promissory notes are, through the misstatement of some material facts and the suppression of others, relative to the safety of such a course and the sufficiency of the maker's assets, induced to place such notes in the hands of attorneys recommended by the maker so that judgment could be taken upon them, under the terms of a mortgage, given to the payees without their knowledge or consent, which would be a ratification of the mortgage, the question whether a judgment upon such notes was procured by fraud or not is a question for the jury. (Gray v. Richmond Bicycle Co., 720.)

13. JUDGMENT OF SISTER STATE—ENJOINING ENFORCEMENT OF FOR FRAUD.—A court of one state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject matter is situated in such other state. (Gray v. Richmond Bicycle Co., 720.)

14. JUDGMENTS—RATIFICATION—LACHES—QUESTION FOR JURY.—Whether a party to a judgment has ratified it or has been so guilty of laches that he is precluded from bringing suit to enjoin its enforcement is a question of fact to be determined by the jury under all the circumstances of the case. (Gray v. Richmond Bicycle Co., 720.)

15. JUDGMENT—FORMER ADJUDICATION—DECREE IN EQUITY A BAR TO ACTION AT LAW.—A decree rendered in a suit in equity brought by a trustee at the request of bondholders against a trust company, in whose hands stock had been deposited as security for the guaranty of bonds, to enforce the obligation of the trust company to deliver over the stock, or the proceeds of its sale, for the satisfaction of an amount remaining due upon the bonds, constitutes an estoppel against the right of a bondholder to sue for damages which he has suffered by reason of the retention of the stock by the trust company until the termination of the litigation. (Bracken v. Atlantic Trust Co., 731.)

16. JUDGMENT—MERGER—LEGAL RIGHTS MERGED IN DECREE IN EQUITY.—Where, upon the refusal of a trust company to deliver stock, or the proceeds of its sale, in compliance with its agreement, a right of action accrues to bondholders and their trustee to sue either in equity to enforce the obligation, or at law to recover damages, a suit in equity by the trustee for the bondholders and the recovery of judgment therein preclude any subsequent action for damages by the bondholders, their legal rights being merged in such judgment. (Bracken v. Atlantic Trust Co., 731.)

17. **RES JUDICATA.—A FORMER JUDGMENT BETWEEN THE SAME PARTIES IS AN ESTOPPEL** in another suit between them upon a different cause of action as to points or question actually litigated and determined, but not as to questions involved and defenses which might have been, but were not, raised. (*Freeman v. Barnum*, 355.)

18. **ESTOPPEL.—A FORMER JUDGMENT BETWEEN THE SAME PARTIES IS NOT AN ESTOPPEL** in a different action between them upon a different cause of action, as to a question which is not shown by the record to have been raised and litigated, though the matter was necessarily involved, and must have been determined before judgment could have been entered in the former suit. This rule applies to a question concerning the constitutionality of a law necessarily involved in the former action. (*Freeman v. Barnum*, 355.)

19. **ESTOPPEL—FORMER ADJUDICATION OF DEFENSE IN ACTION FOR SALARY—MANDAMUS.**—In a proceeding by mandamus to compel an auditor to draw a warrant in favor of the petitioner for certain installments of salary alleged to be due him as assistant district attorney of the county, a former judgment upon mandamus compelling the auditor to draw such a warrant in favor of the same officer and adjudging, as insufficient, a defense that the office had been terminated by a rescission of the order authorizing the appointment, is an estoppel as to such defense in the latter action. (*Freeman v. Barnum*, 355.)

20. **RES JUDICATA—CRIMINAL PROCEEDING.**—A judgment of acquittal on a charge of keeping liquors with an unlawful intent is conclusive in favor of the defendant, who is claimant in a proceeding for the condemnation of the same liquors for keeping with an unlawful intent, where the unlawful intent is referable to the same date, and the court finds that he was the owner of such liquors. (*State v. Adams*, 937.)

21. **RES JUDICATA—CRIMINAL JUDGMENT IN CIVIL PROCEEDING.**—While ordinarily a judgment in a criminal case cannot be used in a civil action as proof of the facts determined, yet the mere fact that one proceeding is civil and the other criminal does not render the doctrine of res judicata inapplicable. (*State v. Adams*, 937.)

22. **RES JUDICATA—PROCEEDING IN REM AND INTER PARTES.**—While a proceeding by the state to condemn liquors is in its nature a proceeding in rem, yet, as to a claimant of such liquors, it is a proceeding inter partes, and he is entitled to the benefit of a previous adjudication of the question in a proceeding between himself and the state. (*State v. Adams*, 937.)

23. **RES JUDICATA—MUTUALITY OF RIGHT.**—As regards the use in a civil case of a judgment in a criminal case as a prior adjudication, where the state and the claimant are the parties in both cases, there is mutuality of right between the state and the claimant. (*State v. Adams*, 937.)

24. **RES JUDICATA—VACATION OF JUDGMENT OF JUSTICE—AUDITA QUERELA.**—Where the judgment of a justice of the peace is vacated, in an action of audita querela, upon the ground that he had no jurisdiction of the subject matter, the question of his want of jurisdiction thereby becomes res judicata. (*Sartwell v. Sowles*, 943.)

25. **JUDGMENTS—CONCLUSIVENESS AS TO PERSONS NOT IN BEING.**—A court of equity has power to bind by its decree converting realty into personalty all the legal or equitable rights or

interests, whether vested or contingent, present or future, of all persons, whether in esse or in posse, who are before the court either by service of process or by virtual representation, provided it satisfactorily appears that such conversion is for the best interest of all the parties, and the decree awards them the same interests in the proceeds of the land as they held in the land itself, and provides for the protection thereof. Such decree is binding upon the unborn children and remaindermen of a life tenant, on the theory that they are represented in the litigation by the life tenant, who is served with process. (*Ridley v. Halliday*, 902.)

26. JUDGMENTS OF CONVICTION—SUFFICIENCY OF—HABEAS CORPUS.—A judgment of a court having jurisdiction of the person and of the offense "that the defendant be, and he hereby is, sentenced to be confined in the state penitentiary for a term of twenty-five months as a punishment for said offense," is a sufficient judgment of conviction, though it omits to expressly adjudge the defendant's guilt. He is not entitled to his liberty upon habeas corpus upon the ground that the judgment is void. (*Ex parte Robertson*, 107.)

JUDICIAL SALES.

1. JUDICIAL SALES—EXTINGUISHMENT OF LIENS.—A sale of land under execution or by foreclosure of a mortgage extinguishes the lien thereof, whether the entire debt secured is satisfied or not. (*First Nat. Bank v. Elliott*, 268.)

2. EVIDENCE OF TITLE—WHAT IS PRIMA FACIE.—The possession of land by a corporation at the time of a sheriff's sale thereof is prima facie evidence of its title. (*Cady v. Purser*, 391.)

See Evidence, 5, 6.

JURISDICTION.

1. JURISDICTION—DETERMINATION OF FACT—COLLATERAL ATTACK.—When the jurisdiction of an inferior or special tribunal, or its power to act in any particular case, depends upon the existence of a fact which is to be established before it by extrinsic evidence, the determination of that fact by the tribunal cannot be questioned in a collateral attack upon its order. (*Estate of Camp*, 871.)

2. JURISDICTION—CONFLICT—STATE AND NATIONAL COURTS.—If a national court has acquired jurisdiction of the estate of a bankrupt, and the trustee appointed by it has, in obedience to its orders, taken possession of the bankrupt's property, and holds it subject to the order of such court, a third person, claiming to own part of such property, cannot maintain an action in the state court against the trustee to recover such part, and the trustee may, in such action, prove that he holds the property sued for as trustee, and not otherwise. (*Turrentine v. Blackwood*, 254.)

3. JURISDICTION—CONFLICT BETWEEN STATE AND NATIONAL COURTS.—A national court, having acquired complete jurisdiction of the assets of a bankrupt and his creditors, may fine and imprison any of them for proceeding in the state court to interfere with such assets without its permission. (*Turrentine v. Blackwood*, 254.)

4. JURISDICTION—STATE AND NATIONAL COURTS—BANKRUPTCY.—If a state and a national court have concurrent jurisdiction over the property of a bankrupt, the court which first takes cognizance of and acquires jurisdiction over the case has

the right to retain it to the exclusion of the other. If an estate in bankruptcy is being administered by the national court, no other court can interfere and wrest from it the possession and jurisdiction first obtained, or any part thereof. (*Turrentine v. Blackwood*, 254.)

See Process.

JUSTICE OF PEACE.

1. JUSTICE OF THE PEACE—JUDGMENT OF, WHEN NOT VOID.—A judgment by a justice of the peace, in an action to recover a mare, giving "judgment against the defendant and in favor of the plaintiff for forty dollars, or the mare in good condition," is not void on its face. Technical accuracy before such officers is not required (*Bolin v. Sandlin*, 209.)

2. JUSTICE OF THE PEACE—JURISDICTION—CERTIORARI.—When the jurisdiction of a justice of the peace is assailed on certiorari to annul his judgment, his want of jurisdiction must appear on the face of the proceedings filed by him in the circuit court in response to the writ, else it will be of no avail. The allegations of the petition for the certiorari cannot be considered on the question of jurisdiction. (*Bolin v. Sandlin*, 209.)

See Ejectment.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—ORAL LEASE—TENANCY AT WILL AND FROM YEAR TO YEAR.—An oral lease of land for a term of years creates an estate at will, with the right of possession in the lessee as long as he is allowed to occupy the land, and such an estate may ripen into a tenancy from year to year, entitling the lessee to six months' notice to quit before yielding possession to the lessor. (*Sartwell v. Sowles*, 943.)

2. LANDLORD AND TENANT—ESTOPPEL TO DISPUTE TITLE.—In an action to recover rent, where the complaint sets out the rental contract and its assignment to the plaintiffs, proof of title is not required of the landlord or his assignees. If the relation of landlord and tenant is proved, the tenant is estopped from disputing his landlord's title. (*Blankenship v. Blackwell*, 175.)

3. LANDLORD AND TENANT—ACTION FOR RENT—PARAMOUNT TITLE AS A DEFENSE.—If the plaintiff, in an action for rent, fails to establish such a valid lease as the law requires to operate as an estoppel against the alleged tenant, such tenant will, in certain cases, be allowed to set up a paramount title in himself, or out of the lessor. (*Blankenship v. Blackwell*, 175.)

4. LANDLORD AND TENANT—ESTOPPEL—THE ACCEPTANCE OF A LEASE BY ONE ALREADY IN POSSESSION works no estoppel in any case, as between landlord and tenant, where such acceptance was induced by fraud, mistake, misapprehension of the facts, duress, or other improper means used by the lessor; and, in the absence of such improper means upon the lessor's part, the acceptance of a lease by one in possession works no estoppel after the term has expired. (*Blankenship v. Blackwell*, 175.)

See Crops, 4; Elevators, 11.

LETTERS.

1. UNLAWFUL SEIZURE OF LETTERS—BREACH OF TRUST.—That the delivery of private letters to a prosecuting at-

orney by an agent of their owner is a flagrant breach of trust does not make the receiving of such letters an unlawful search and seizure. (Barrett v. Fish, 914.)

2. **LETTERS AS EVIDENCE—POSSESSION OF STATE'S ATTORNEY.**—The fact that private letters are in the possession of a prosecuting attorney is immaterial upon the question of the right to produce them in court. (Barrett v. Fish, 914.)

3. **LETTERS AS EVIDENCE—IMMATERIAL HOW OBTAINED.**—For the purpose of determining the admissibility of private letters or other papers in evidence, a court of law will take no notice as to how such letters or papers were obtained. (Barrett v. Fish, 914.)

4. **LETTERS—RESTRAINING PUBLICATION OF.**—A COURT OF EQUITY will protect the right of property in private letters, by enjoining their unauthorized publication by any person who may attempt or intend such publication, but such protection is based solely on the property right of their owner or possessor. (Barrett v. Fish, 914.)

5. **LETTERS AS EVIDENCE—PRODUCED FOR PURPOSES OF JUSTICE.**—For the purposes of public justice publicly administered, private letters in the hands of a party other than the writer must always be produced, unless they would tend to criminate the person required by law to produce them. (Barrett v. Fish, 914.)

6. **LETTERS—VOLUNTARY PRODUCTION IN EVIDENCE—INJUNCTION.**—Where the holder of private letters could be compelled to produce them in court, equity will not enjoin their voluntary production by him. (Barrett v. Fish, 914.)

7. **LETTERS AS EVIDENCE—SUIT TO ENJOIN PRODUCTION OF—WHEN RELIEF DENIED.**—In a suit by the owner of letters against one in whose possession they are to restrain their production and publication in court, an injunction will be denied, where the sole purpose of the proceeding is to enable the owner to obtain possession of such evidence that she may suppress or destroy it, and thus defeat the ends of justice. (Barrett v. Fish, 914.)

LICENSES.

1. **LICENSE—WHEN REVOCABLE.**—A mere naked license by acquiescence, unless enjoyed for such a time as to bar the statute of limitations, may be revoked at any time at the pleasure of the licensor. (Ewing v. Rhea, 783.)

2. **LICENSE—WHAT WILL NOT RENDER IRREVOCABLE.**—A mere naked license, predicated upon an invasion of another's right, and which is in effect a trespass upon his property, does not encourage a party to act upon the faith of the implied permission as to render it irrevocable, even when money has been expended in improving the property, under a belief that the uninvited use relied upon will never be interrupted. (Ewing v. Rhea, 783.)

3. **LICENSE TO CONSTRUCT DITCH—WHEN REVOCABLE.**—A mere naked license by acquiescence, whereby the defendant's grantors permitted the plaintiff to construct an irrigating ditch across their lands, at considerable expense, may be revoked and the supply of water cut off by the defendant, at any time before the statute of limitations has run. (Ewing v. Rhea, 783.)

See Constitutional Law, 7.

LIEN.

ACTIONS—RIGHT TO SET ASIDE LIEN.—Unless a person is injuriously affected by a lien, he has no right to institute an action to set it aside. (Arkadelphia Lumber Co. v. McNutt, 299.)

See Mechanics' Liens; Vendor and Purchaser, 1-4

LIMITATION OF ACTIONS.

1. LIMITATION OF ACTIONS — PLEADING — ABSENCE FROM STATE.—If absence of a party from the state is set up to defeat a plea of the statute of limitations, such absence must be specifically alleged. An allegation that the cause of action, "while apparently barred by the statute of limitations, is not in fact barred, but in full force," is wholly insufficient. (Sully v. Children, 875.)

2. STATUTE OF LIMITATIONS—COMMENCEMENT OF ACTION.—Under the statutes of Wisconsin an attempt to commence an action is equivalent to commencing it, so far as the statute of limitations is concerned, when the summons is delivered to the proper officer, with the intent that it shall be served, within the time specified in the statute, although it is not actually served until after the expiration of such time. (Fred Miller Brew. Co. v. Capital Ins. Co., 529.)

3. STATUTE OF LIMITATIONS — PLEADING — WAIVER.—The statute of limitations is an affirmative defense which must be pleaded, and is waived by permitting default to be entered. (Fred Miller Brew. Co. v. Capital Ins. Co., 529.)

See Adverse Possession; Corporations, 5; Executors and Administrators, 19, 20; Vendor and Purchaser, 2

MANDAMUS.

1. MANDAMUS — ALLOWANCE OF—REVIEW ON APPEAL. When the court below has power, in the exercise of its discretion, to grant a writ of mandamus, and does grant it, the action of the court in that respect is not reviewable on appeal. (People v. Coler, 605.)

2. MANDAMUS — DEFENSE—EFFECT OF IMPORTING A PROMISE INTO A CONTRACT BY FORCE OF A VOID STATUTE.—If a person, having a contract to do city work, fully performs it according to stipulations, and receives from the proper authorities a certificate showing that the contract price agreed upon has been earned, it is no defense to a writ of mandamus sued out by him to compel the city to pay the amount due, that he consented in his contract, according to the provisions of a labor law, that the contract should be void and of no effect in the event of his violation of such law, respecting the amount of wages to be paid, as the obligations and legal effect of a promise or engagement imported into a contract by force of a statute whereby the contracting parties agree to obey or execute some law, depend entirely upon the validity of the law. Such a promise or agreement cannot survive the statute upon which it is founded, and, if the statute is invalid, the promise or agreement must fall with it. (People v. Coler, 605.)

3. MANDAMUS TO COMPEL JUDGE TO CERTIFY HIS INCOMPETENCY.—When a probate judge is disqualified from hearing a cause, mandamus is the proper remedy to compel him to certify his incompetency to the proper officer, as required by statute. (Crook v. Newborg, 190.)

MARK.

See Contracts, 4.

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE.—CRUELTY, to constitute a ground for divorce, must consist of acts of physical violence. (*Maddox v. Maddox*, 431.)

2. MARRIAGE AND DIVORCE—CRUELTY.—Denial of ordinary comforts and accommodations and want of civil attentions are not sufficient cruelty to constitute a ground for divorce. (*Maddox v. Maddox*, 431.)

3. DIVORCE—DECREE OF—POWER TO MODIFY AGREEMENT EMBODIED IN.—When a husband and wife have separated by reason of his misconduct, a contract whereby he agreed to pay her a certain amount each month for her maintenance, if embodied in a subsequent decree of divorce, becomes forever binding, and is not subject to revocation or modification except by the consent of the parties thereto. (*Henderson v. Henderson*, 41.)

MARSHALING SECURITIES.

See Mortgages, 11-13.

MASTER AND SERVANT.

1. MASTER AND SERVANT—NONLIABILITY FOR NEGLIGENCE OF SERVANT OF INDEPENDENT CONTRACTOR—DUAL CAPACITY.—Dealers in hardware, tinware, plumbing, etc., engaged by the manager of a fruit farm to repair a tank thereon, used for storing distillate, are independent contractors, and not servants of the owner of the farm. Hence, such owner is not answerable in damages for the death of one of his own employes occasioned by an explosion of the tank through the negligence of a servant employed by such contractors, although the manager acted in a dual capacity, being a member of the firm employed to repair the tank, and instructing their servant to repair it. The servant of the firm, in such a case, stands in the position of an independent contractor. (*Hedge v. Williams*, 366.)

2. MASTER AND SERVANT—CONCLUSIVENESS OF VERDICT AS TO CAPACITY IN WHICH SERVANT ACTED—DUTY OF COURT.—If a firm of dealers in hardware, tinware, plumbing, etc., has been engaged to repair a tank on a fruit farm, used for storing distillate, and an employe of the owner of the farm is killed by an explosion of the tank through the negligence of a servant employed by the firm, whereupon an action for damages is brought against the owner of such farm, a verdict for the plaintiff is not conclusive that the servant employed by the firm was acting as a servant of the defendant in repairing the tank, where the evidence shows, without conflict, that he was an employe of the firm. Upon such a state of facts, it becomes the duty of the appellate court to decide, as a matter of law, what the facts prove. (*Hedge v. Williams*, 366.)

3. MASTER AND SERVANT—FELLOW-SERVANTS.—A person employed to work in the tailoring department of a drygoods store, and another person employed to run an elevator set apart for the use of employes in going to and from their work, and in going from one floor to another, as their duties require, are fellow-servants. (*Spees v. Boggs*, 792.)

4. MASTER AND SERVANT—FELLOW-SERVANTS.—Persons in the employ of the same master, engaged in the same common work, and performing duties and services for the same general purpose, are fellow-servants. They need not be engaged in the same particular work. (*Spees v. Boggs*, 792.)

MECHANICS' LIENS.

1. MECHANICS' LIENS—LAND PURCHASED BY CITY SUBJECT TO LIEN.—If a contractor has perfected a mechanic's lien against property while owned by an individual, the subsequent purchase of such property by a city does not operate to deprive the lienor of the benefit of statutory provisions for the enforcement of the lien by a forced sale of the property. (*Salem v. Lane*, 481.)

2. MECHANICS' LIENS—WHO ENTITLED TO AS A CONTRACTOR.—One who supplies, under contract with the owner of land, an engine to be placed in an electric light plant, being erected by such owner on the land under a contract with a city to buy the plant and land when the plant is completed, is a contractor, and entitled to the benefit of the mechanic's lien law. (*Salem v. Lane*, 481.)

3. MECHANICS' LIENS—WHAT INTEREST IN LAND MAY ATTACH TO.—A mechanic's lien for machinery supplied for an electric light plant by contract with the equitable owner of the land attaches to his equitable interest therein, and to the legal title, if he acquires that, and is not divested by a subsequent conveyance of the land and plant to a city. (*Salem v. Lane*, 481.)

4. MECHANICS' LIENS—PLEADING.—It is not essential that a bill to enforce a mechanic's lien, in express terms, denominate complainant therein to be either a contractor or a subcontractor, if the material circumstances of time, place, acts, and other facts necessary to establish the capacity in which arises the right to the relief claimed are plainly alleged. (*Salem v. Lane*, 481.)

5. MECHANICS' LIENS—ITEMS PROPERLY INCLUDED.—If a contract for an engine provides that a certain sum shall be added to the contract price if the services of an erector are required to set up the engine, such sum for the services, board, and lodging of such erector while engaged in setting up the engine is properly regarded as part of the contract price, for which a mechanic's lien may be filed and enforced. (*Salem v. Lane*, 481.)

6. MECHANICS' LIENS—ITEMS PROPERLY INCLUDED.—A charge for extra shafting specified in a contract for the purchase of an engine, but afterward cut off and rendered valueless by the order of the purchaser, is properly regarded as composing a part of the contract price of the engine, and may be included in a claim for a mechanic's lien. (*Salem v. Lane*, 481.)

7. MECHANICS' LIEN—SCOPE OF TERM "IMPROVEMENT"—HOW DETERMINED.—A statute giving a lien to one doing work upon or furnishing materials for "any building or improvement upon land" recognizes that improvements meriting the protection of a lien may be made upon land otherwise than by buildings, but, as they may occur in unforeseen variety, the scope of the term "improvement" is left for determination in particular cases as they may arise. (*Bates v. Harte*, 186.)

8. MECHANIC'S LIEN—IMPROVEMENTS.—A WELL designed and made for a permanent supply of water is an improvement upon land within the meaning of a statute which gives a lien to one doing work upon or furnishing materials for any improvement upon land. (*Bates v. Harte*, 186.)

MERGER.

See Judgment, 11, 16.

MINES AND MINING.

1. MINES.—THE LOCATOR OF A LODE CLAIM UNDER THE UNITED STATES MINING LAW OF 1866, who had the land surveyed, and who paid therefor and applied for a patent prior to the mining act of 1872, is entitled to all the rights which attached to his location under the act of 1866, though the land was not patented until after the passage of the act of 1872. He is also entitled to all additional rights inuring to such a location conferred upon him by the act of 1872. (*Argonaut Min. Co. v. Kennedy Min. etc. Co.*, 317.)

2. MINES—QUARTZ CLAIMS—PRESUMPTION AGAINST FORFEITURE.—The rights of locators of lode claims, under former laws, were expressly confirmed to them by the United States mining act of 1872, and, as the presumption against forfeiture is very strong, that act will not be construed to work a forfeiture of rights secured to the owners of lode claims located under the United States mining law of 1866. (*Argonaut Min. Co. v. Kennedy Min. etc. Co.*, 317.)

3. MINES—QUARTZ CLAIMS—EXTRALATERAL RIGHTS.—PARALLEL END LINES were not required in locations of lode claims, by the United States mining law of 1866, to insure extralateral rights, or at all. Such rights were specifically given by that act. Hence, the end lines of a lode claim, located under that act, though patented under the United States mining act of 1872, need not be parallel to insure extralateral rights to the locator. (*Argonaut Min. Co. v. Kennedy Min. etc. Co.*, 317.)

4. MINES—QUARTZ CLAIMS—RIGHT TO FOLLOW DIP THOUGH END LINES ARE NOT PARALLEL.—The fact that the end lines of a claim located under the United States mining law of 1866 are not parallel, though the patent was not issued until after the passage of the United States mining act of 1872, does not deprive the owner of such claim of the right to follow his lode on the dip beyond the side lines of the surface location. (*Argonaut Min. Co. v. Kennedy Min. etc. Co.*, 317.)

5. MINES—QUARTZ CLAIMS—DIVERGENCE OF END LINES—MEASURE OF EXTRALATERAL RIGHTS.—If a lode claim was patented under the United States mining act of 1872, but the location was made under the United States mining law of 1866, and the patent granted a certain number of feet of the lode throughout its entire depth, confining extralateral rights to that part of the lode lying between vertical planes drawn downward through the ends of the survey at the surface, which survey has end lines diverging in the direction of the dip of the lode, the extralateral rights of the patentee on the dip cannot exceed the stated number of feet on the lode at any depth, but he is entitled to all ore of the lode at any depth which lies between vertical planes drawn at right angles to its general course on the surface. (*Argonaut Min. Co. v. Kennedy Min. etc. Co.*, 317.)

6. MINES—LICENSE, WHEN REVOCABLE.—When the owner of one placer mining claim runs tailings upon another, by virtue of a license, as he claims, the deposit of tailings on the lower claim does not constitute a permanent improvement thereon, which may inure to the advantage of the owner thereof, and the license, conceding it to exist, is therefore revocable, and not a defense to an action against the upper owner to obtain redress for the latter's act in flooding the plaintiff's claim with debris. (*Miser v. O'Shea*, 751.)

See Adverse Possession, 9.

MONOPOLIES.

1. **MONOPOLY—WHEN MAY BE GRANTED.**—Exclusive privileges and franchises may be granted when absolutely necessary to insure safety to the people, but not otherwise. (*State v. Santee*, 489.)

2. **POLICE POWER—MONOPOLY.**—THE LEGISLATURE cannot, under the guise of the police power, create a monopoly. (*State v. Santee*, 489.)

MORTGAGES.

1. **CONTRACTS—STATUTE OF FRAUDS—EVIDENCE TO SHOW THAT DEED WAS INTENDED AS A MORTGAGE.**—A statute prohibiting the creation of parol trusts in lands does not prevent the introduction of oral testimony to show that a deed, absolute in form, was intended as a mortgage. (*Glass v. Hieronymus*, 225.)

2. **MORTGAGES—DEEDS ABSOLUTE.**—An oral agreement that a sale of land is on condition that the vendor shall have the right to repurchase or resell cannot be enforced by a bill in equity, to have the deed conveying the land, and absolute on its face, declared a mortgage. (*Glass v. Hieronymus*, 225.)

3. **MORTGAGES—DEEDS ABSOLUTE AS.**—A grantee's admission, in a suit to declare an absolute deed a mortgage, that he had agreed to permit his vendor to repurchase the land before the sale was made does not remove the burden of proof from the grantor, but amounts to an admission that the writings do not evidence the whole transaction, and relaxes the rule requiring stringent proof that an absolute deed was intended as a mortgage, and inclines the court in favor of the right of redemption. (*Glass v. Hieronymus*, 225.)

4. **MORTGAGES—DEEDS ABSOLUTE AS—EVIDENCE.**—If, in a suit to declare an absolute deed a mortgage, plaintiff's evidence tends to show that defendant advanced the balance due on the purchase price of the land, worth twice that amount, and took an absolute deed as security, and defendant testifies that there was a mere oral agreement that the complainant might repurchase the land, complainant is entitled to the relief sought, as the difference between the real value of the land and the amount advanced tends strongly to show that the land was deeded as mere security, and equity favors the right to redeem in doubtful cases. (*Glass v. Hieronymus*, 225.)

5. **THE RECORDING OF MORTGAGE IN THE WRONG BOOK** is not constructive notice to anyone. (*Cady v. Purser*, 391.)

6. **MORTGAGES—FORECLOSURE—EXTINGUISHMENT OF THIRD PERSON'S RIGHTS.**—A sale under foreclosure does not extinguish the rights of a third person, acquired subsequently to the date of the mortgage, where the mortgagee failed to record his mortgage until after such person had acquired an interest in the land. (*Cady v. Purser*, 391.)

7. **MORTGAGES NOT RECORDED—FORECLOSURE—EFFECT OF, AS TO RIGHTS ACQUIRED BY A THIRD PERSON.** A mortgage not properly recorded, as where the record thereof is made in the wrong book, is void as against one who buys the land at a sheriff's sale and who immediately records his interest therein. The latter's rights cannot, therefore, be affected by a subsequent judgment of foreclosure and sale. (*Cady v. Purser*, 391.)

8. **MORTGAGES—FORECLOSURE—ADVERSE TITLE.**—A paramount and adverse title is not a proper subject for adjudication.

in an action for the foreclosure of a mortgage, and this includes a title which is adverse to that which the mortgagee brings before the court. (Cady v. Purser, 391.)

9. MORTGAGES—FORECLOSURE—WHAT TITLE IS ADVERSE.—A title may be paramount and superior to the title of the mortgagee, although acquired after the date of the mortgage, and if after the execution of the mortgage a purchaser from the mortgagor acquires a title which is superior to that of the mortgagee, that title is adverse to the mortgagee's title. (Cady v. Purser, 391.)

10. ESTOPPEL—ACTION TO QUIET TITLE—PURCHASER AT SHERIFF'S SALE—MORTGAGE NOT RECORDED.—The paramount title of the purchaser at a sheriff's sale is not a proper subject for adjudication in a subsequent action to foreclose a mortgage given before such sale, but not properly recorded; and where there was, in fact, no adjudication in an action by such purchaser to quiet title, upon the issue as to whether the title of the plaintiff was subordinate to the claim of the mortgagee, the plaintiff is not estopped from asserting his superior title against the purchaser under the decree of foreclosure. (Cady v. Purser, 391.)

11. MORTGAGES—SUBSEQUENT DEED TO PART OF LAND—MARSHALING SECURITIES.—Where a mortgagor, after the execution of the mortgage, conveys different parcels of the mortgaged property to different persons at different times, by warranty deeds, which contain no reference to the existence of the mortgage, the portion of such premises retained by the mortgagor is primarily liable for the whole of the mortgage debt, and must be first sold to satisfy the mortgage; and if this portion proves insufficient, resort may be then had to the parcels conveyed, by selling them in the inverse order of their alienation. (Howser v. Cruikshank, 76.)

12. MORTGAGES—SUBSEQUENT DEED TO PART OF LAND—NOMINAL CONSIDERATION.—Where a mortgagor, after the execution of the mortgage, conveys a portion of the mortgaged premises by a warranty deed for a nominal consideration, the grantee has a right to demand that the mortgagee shall first resort to the portion of the land retained by the mortgagor to satisfy his mortgage. (Howser v. Cruikshank, 76.)

13. MORTGAGES—DEED TO PART OF LAND—SECOND MORTGAGE—MARSHALING SECURITIES.—Where a mortgagor, who conveys a portion of the mortgaged premises by warranty deed without reciting the existence of the mortgage, such deed being placed on record and the grantee taking possession, subsequently gives a second mortgage upon the residue of the land to one who becomes the assignee of the first mortgage after the execution of the warranty deed, the second mortgagee, having notice of the grantee's equity, acquires only the right which the mortgagor had. The purchase of the first mortgage gives him no greater rights than were possessed by the mortgagee in the first mortgage; hence the grantee in the warranty deed has a right to have the residue of the property included in the second mortgage sold to satisfy the first mortgage before resorting to the portion conveyed in the deed. (Howser v. Cruikshank, 76.)

14. MORTGAGES—REDEMPTION—RIGHT OF SUBSEQUENT GRANTEE.—The grantee in a warranty deed of a part of mortgaged premises has the right to redeem from under the mortgage before the foreclosure sale. (Howser v. Cruikshank, 76.)

15. ESTOPPEL—FORECLOSURE OF MORTGAGE—SEPARATE ACTION BY JUNIOR LIENHOLDER OR HIS ASSIGNEE.

A decree foreclosing a mortgage does not estop the holder of a junior lien or his assignee from maintaining a separate action to sell any unsold portion of the mortgaged land and to reach any surplus paid into court under such decree, although the junior lienholder was made a party defendant to the action of foreclosure, if he did not appear therein or set up his lien in that action. (Greenebaum v. Davis, 338.)

16. MORTGAGES—REDEMPTION BY JUDGMENT CREDITOR EXTINGUISHES LIEN.—As against a judgment creditor offering to redeem from a mortgagee who has purchased at his own foreclosure sale, the unpaid balance of the mortgage debt does not, within the meaning of the statute, constitute a "lawful charge" which such creditor is required to satisfy as a condition precedent to his right to redeem. (First Nat. Bank v. Elliott, 268.)

17. MORTGAGES — FORECLOSURE — REDEMPTION—PARTIES.—If, in an action to redeem from a foreclosure sale, the purchaser being the mortgagee, who is a married woman, it is alleged that such purchaser, together with her husband, jointly executed a contract of sale of the land to a subpurchaser, the husband is, if not a necessary party, not an improper party, if the bill prays that the equities of all the parties be adjusted, and that upon redemption the husband be compelled to join in a deed with his wife (First Nat. Bank v. Elliott, 268.)

See Attachment, 5; Chattel Mortgages; Covenants; Creditors' Bills; Crops; Equity; Judicial Sales.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS — SPECIAL BENEFITS — CONSTITUTIONAL LAW.—Although a statute providing for the construction of sidewalks by special taxation does not limit the amount of the tax to the amount that the property will be specially benefited, it is not obnoxious to the fourteenth amendment of the national constitution. Property owners are protected from arbitrary exactions under such statute by the rule that ordinances passed thereunder, to be valid, must be reasonable, and not oppressive or unjust. (Job v. Alton, 448.)

2. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS —SPECIAL BENEFITS—REMEDY.—Upon proceedings for a judgment for the sale of property to pay a delinquent special tax levied under authority of a statute authorizing the construction of sidewalks by special taxation, the property owner has a right to have the questions decided whether such tax is in excess of the benefits derived, and whether the ordinance under which the tax is levied is unreasonable and oppressive. (Job v. Alton, 448.)

3. MUNICIPAL CORPORATIONS—JOINT LIABILITY WITH PROPERTY OWNER.—An action in tort to recover damages for personal injury, caused by a defective sidewalk, may be brought either against the municipality or the property owner, but they cannot be sued jointly. The measure of their responsibility is very different. That of the owner is primary and absolute, while that of the municipality is secondary and supplemental. (Dutton v. Lansdowne Borough, 814.)

NATIONAL BANK.

See Banks and Banking, 6, 7; Constitutional Law, 15.

NEGLIGENCE.

1. NEGLIGENCE—WHEN QUESTION FOR COURT.—If there is no evidence of negligence on the part of the defendant, or no evidence from which the jury can reasonably infer such negligence, it is the duty of the court to withhold the case from its consideration. A verdict for the plaintiff, under such circumstances, must be set aside. (Tully v. Philadelphia etc. R. R. Co., 425.)

2. NEGLIGENCE—WHEN QUESTION FOR JURY.—It is the province of the jury to determine doubtful questions of negligence; and if the evidence, or the reasonable inference that the jury may draw therefrom, is sufficient to support a verdict for the plaintiff, the case should be submitted to the jury. (Tully v. Philadelphia etc. R. R. Co., 425.)

3. NEGLIGENCE IS FAILURE TO OBSERVE, for the protection of the interests of another, that degree of care, precaution, and vigilance which the circumstances demand, whereby such other person suffers injury. Negligence is a failure to exercise such reasonable care as should be exercised by a person of ordinary prudence under similar circumstances. (Tully v. Philadelphia etc. R. R. Co., 425.)

4. NEGLIGENCE — CONTRIBUTORY — TRESPASSERS. — A trespasser may recover for injury resulting from the gross negligence or carelessness of the defendant. The mere fact that plaintiff, at the time he suffered the injury complained of, was a trespasser, and would not have been injured if he had not trespassed, is not conclusive evidence of contributory negligence. (Tully v. Philadelphia etc. R. R. Co., 425.)

5. NEGLIGENCE—CONTRIBUTORY—CHILDREN.—In the application of the doctrine of contributory negligence to children, the rule governing adults is greatly modified. A child is held to the exercise of such a degree of care and discretion only as is reasonably to be expected from children of his age. The care to be required of a child is to be ascertained by his maturity, discretion, and capacity, and the particular circumstances of the case, and the determination of such question should generally be submitted to the jury. (Tully v. Philadelphia etc. R. R. Co., 425.)

6. NEGLIGENCE—CONTRIBUTORY, WHEN DOES NOT BAR RECOVERY.—Plaintiff may recover for an injury caused by defendant's negligence, notwithstanding plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of plaintiff's danger, to use ordinary care to avoid injury to him. (Tully v. Philadelphia etc. R. R. Co., 425.)

7. NEGLIGENCE — CONTRIBUTORY — REMOTE—When the negligence of a plaintiff does not occur at the time of the accident, but is prior thereto, it is not mutual with that of the defendant, and is not one of the proximate causes of the accident. (Kilpatrick v. Grand Trunk Ry. Co., 939.)

8. CONTRIBUTORY NEGLIGENCE — STATUTORY DUTY.—A plaintiff who is guilty of contributory negligence cannot recover, even when the injury arises from the neglect of the defendant to observe a statutory duty. (Kilpatrick v. Grand Trunk Ry. Co., 939.)

9. NEGLIGENCE—WHEN A QUESTION OF LAW.—When the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and cir-

cumstances are so decisive, one way or the other, as to leave no reasonable doubt about it. (*Kilpatrick v. Grand Trunk Ry. Co.*, 939.)

10. CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW. One who attempts, in the night-time, with a lantern in his hand, to board a freight train running faster than a man can run, is guilty of negligence as a matter of law. (*Kilpatrick v. Grand Trunk Ry. Co.*, 939.)

11. NEGLIGENCE—CONTRIBUTORY—PLEA OF, AND ITS EFFECT.—A plea of contributory negligence can be interposed only to a complaint averring simple negligence; it is no answer to a complaint averring wantonness or willfulness on the part of the defendant. (*Highland etc. R. R. Co. v. Robbins*, 153.)

12. NEGLIGENCE—TRESPASSERS—INFANTS AND INCOMPETENTS AS.—The fact that negligence cannot be imputed to a child of such tender years as to be without judgment or discretion does not alter the rule as to trespassers, whether adults or infants. A trespasser need not have judgment. He may be a discreet person, an infant, an idiot, or an animal. (*Highland etc. R. R. Co. v. Robbins*, 153.)

13. NEGLIGENCE—ACTION FOR BY CHILD.—If an infant, suing for his own benefit in an action for personal injuries, is of such tender years that he is conclusively presumed to be incapable of judgment and discretion, and of owing duty to another, neither contributory negligence on his part nor that of his parent can be set up to defeat a recovery. (*Highland etc. R. R. Co. v. Robbins*, 153.)

14. NEGLIGENCE—BURDEN OF PROOF.—Negligence is an affirmative fact to be established by evidence on the part of the party alleging the facts constituting such negligence. (*James v. Orrell*, 293.)

15. NEGLIGENCE—BURDEN OF PROOF.—If recovery is sought on the ground of the negligence of the defendant, the burden of proof is on the plaintiff, except in cases of common carriers. In actions against employers, some specific act of negligence must be alleged and proved. (*Spees v. Boggs*, 792.)

16. NEGLIGENCE—PROOF, BURDEN OF.—In an action to recover damages due to the negligence of another, the burden is on the plaintiff to establish both the negligence of the defendant and that the plaintiff was free from contributory negligence. (*Wieland v. Delaware etc. Canal Co.*, 707.)

17. NEGLIGENCE—CONTRIBUTORY—ABSENCE OF—AFFIRMATIVE PROOF.—In an action to recover damages for the death of another, due to the defendant's negligence, where there is neither direct nor circumstantial evidence which indicates either the presence or the absence of contributory negligence on the part of the deceased, the plaintiff, in order to recover, must give some affirmative evidence from which a jury can find that the decedent was free from contributory negligence. (*Wieland v. Delaware etc. Canal Co.*, 707.)

18. NEGLIGENCE—MAXIM, RES IPSA LOQUITUR—APPLICATION OF.—It is not the injury, but the manner and circumstances of the injury, that justify the application of the maxim, *Res ipsa loquitur*, and the inference of negligence. Nor does the application of the principle depend on the relation between the parties, except indirectly so far as that relation defines the measure of duty imposed on the defendant. (*Griffin v. Manice*, 630.)

19. NEGLIGENCE—CASE OF RES IPSA LOQUITUR—DEFINITION—CASE OF CIRCUMSTANTIAL EVIDENCE.—When the circumstances of an injury, from which a jury is asked to infer negligence, are those immediately attendant on the occurrence, we speak of it as a case of “*res ipsa loquitur*,” which, literally translated, means that “the thing speaks for itself”; but when they are not immediately connected with the occurrence, it is an ordinary case of circumstantial evidence. (*Griffin v. Manice*, 630.)

20. NEGLIGENCE CAUSING DEATH—ACTION FOR—RES GESTAE—INADMISSIBLE DECLARATIONS.—In an action for negligently causing death, the declarations of the deceased, made to third parties after the accident, form no part of the *res gestae*, and should not be admitted against the plaintiff. (*Hedge v. Williams*, 366.)

21. NEGLIGENCE—EVIDENCE.—In an action to recover for personal injury received through the negligence of a railroad company, evidence that the company settled with another person injured in the same accident is incompetent, but not prejudicial, provided the company’s negligence is otherwise established. (*St. Louis etc. Ry. Co. v. Stewart*, 311.)

See Elevators; Evidence, 7; Railroads, 6-24.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—MAKERS, WHEN BECOME SURETIES.—The makers of a note become sureties to one who assumes its payment for them, or to one who, after such assumption and with knowledge thereof, takes an assignment of the debt. (*Sully v. Childress*, 875.)

2. BILLS AND NOTES—PAYABLE TO “TRUSTEE”—NEGOTIABILITY.—A promissory note payable to a named person, “trustee,” is not rendered non-negotiable by the use of the word “trustee,” such suffix being merely *descriptio personae*. (*Central State Bank v. Spurlin*, 511.)

3. NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—NOTICE OF FRAUD.—One who purchases a promissory note in the usual course of business, before maturity, and for full value, without notice of any infirmity, is a bona fide holder thereof, and the mere fact that he was negligent in making inquiries in regard to the note is not sufficient to charge him with notice that the note was obtained by fraud. (*Central State Bank v. Spurlin*, 511.)

4. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER.—A negotiable note transferred to secure a pre-existing debt, in consideration of an extension of the time for the payment of the debt, constitutes the transferee a bona fide holder for value, and the note in his hands is not subject to equities between the original parties of which he had no notice. (*Louisville Bank. Co. v. Howard*, 126.)

5. NEGOTIABLE INSTRUMENTS.—The negotiability of a note made payable to a bank is not affected by a stipulation therein authorizing it to appropriate on this note, whether due or not, at any time, at its option, without notice or legal proceedings, any money which they, or any one or more of them, have jointly or severally in said bank on deposit or otherwise. (*Louisville Bank. Co. v. Howard*, 126.)

6. NEGOTIABLE INSTRUMENTS.—The negotiability of a note made payable to a bank is not affected by a stipulation therein authorizing “said bank to appropriate on this note, whether due

or not, at any time, at its option, without notice or legal proceedings, any money which they, or any one or more of them, have jointly or severally in said bank on deposit or otherwise." The stipulation does not render the date of payment nor the amount to be paid uncertain. (Louisville Bank Co. v. Gray, 120.)

7. CHECKS—PRESENTMENT—LIABILITY OF DRAWER.—To charge the drawer of a check, the holder is required to present it within a reasonable time, and after the lapse of a reasonable time from its delivery by the drawer, the holder retains it at his peril. (Morris v. Eufaula Nat. Bank, 95.)

8. CHECKS — PRESENTMENT — WHEN DRAWER DISCHARGED.—As between the holder and the drawer of a check, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer unless loss to him has resulted. (Morris v. Eufaula Nat. Bank, 95.)

9. CHECKS—DRAWER AND PAYEE, RIGHTS OF.—As between the drawer and the payee of a check, the question of their respective rights and liabilities is to be ascertained by the commercial law. (Morris v. Eufaula Nat. Bank, 95.)

10. CHECKS—PRESENTMENT.—THE REASONABLE TIME allowed the holder of a check for presenting it, when he receives it in the same place where the bank on which it is drawn is located, is till the close of banking hours on the next secular day. (Morris v. Eufaula Nat. Bank, 95.)

11. NEGOTIABLE INSTRUMENTS—WAIVER OF PROTEST.—If the words "no protest" are written across the face of a bill of exchange sued on, it is not necessary to specifically allege a waiver of protest. (Citizens' Bank v. Millet, 546.)

12. NEGOTIABLE INSTRUMENTS—BILLS OF EXCHANGE—LIABILITY OF AGENT.—If an agent in his own name draws a bill of exchange on his principal for a debt of the latter, such debt is sufficient consideration to bind the agent, and render him personally liable therefor. (Citizens' Bank v. Millet, 546.)

13. NEGOTIABLE INSTRUMENTS—EVIDENCE TO VARY OR CONTRADICT.—Parol evidence is inadmissible to show an agreement between the payee and one who draws a bill of exchange as agent, that the payee was to look alone to the principal of such agent for payment. (Citizens' Bank v. Millet, 546.)

See Executors and Administrators, 17, 18; Warehousemen.

NEW TRIAL.

1. NEW TRIAL ORDERED BY THE SUPREME COURT is a trial de novo, and the jury should not in any manner be influenced by the action of the former jury. (Nohrden v. Northeastern R. R. Co., 826.)

2. TRIAL—ABSENCE OF COUNSEL—EFFECT.—The inexcusable absence of counsel for one of the parties at the trial of a cause, where no timely effort to effect an arrangement for the postponement of the trial has been made, furnishes no ground for the granting of a new trial. (Western Union Tel. Co. v. Chamblee, 89.)

NOTARIES.

1. NOTARIES—OFFICIAL MISCONDUCT OR NEGLIGENCE.—A notary public and the sureties on his official bond are answerable in damages to parties injured by the officer's official misconduct or neglect. (Joost v. Craig, 374.)

2. NOTARIES—FALSE CERTIFICATE—LIABILITY.—A notary public and the sureties on his official bond are answerable in damages to one who relies upon the officer's certificate of acknowledgment to a forged deed, which certificate falsely states that the person who made the acknowledgment was known by the officer to be the person described in the instrument, and whose name was subscribed thereto. (Joost v. Craig, 374.)

3. NOTARIES—RIGHT TO RELY UPON CERTIFICATE—NEGLIGENCE.—A person is not guilty of negligence in relying upon the certificate of a notary public. The presumption is that the officer has done his duty. Hence, one who buys property and takes a deed therefor is not negligent in paying over the money without further inquiry as to the identity of the grantor, though the deed turns out to be a forgery, where the notary's certificate of acknowledgment certifies, though falsely, that the person who made the acknowledgment was known by the officer to be the person described in the instrument, and whose name was subscribed thereto, and where the purchaser has no reason to doubt the truthfulness of the certificate. (Joost v. Craig, 374.)

4. NOTARIES—IDENTITY OF UNKNOWN PERSONS—PROOF OF.—The Civil Code of California expressly forbids a notary public from taking an acknowledgment unless he knows that the person making it is the one described in the instrument. If he does not know this of his own personal knowledge, it must be proved by the oath of a credible witness, known to the notary, and whose name must be stated in the certificate. It is not enough that the person making the acknowledgment be introduced to the notary by a responsible party. To take an acknowledgment upon such introduction without the oath is negligence sufficient to render the notary and his sureties answerable, if the certificate turns out to be untrue, and injury results by reason thereof. (Joost v. Craig, 374.)

OFFICERS.

1. OFFICERS—LIABILITY OF SURETY—DEFENSE OF FALSE REPRESENTATIONS.—Unauthorized statements made by the cashier of a bank for the purpose of inducing a person to become a surety on the bond of its teller does not bind the bank nor relieve the surety from liability. (Lieberman v. First Nat. Bank, 414.)

2. OFFICERS—BONDS—LIABILITY OF SURETY—FALSE REPRESENTATIONS AS A DEFENSE.—The published reports of a bank, though false, purporting to show its resources and liabilities, and relied upon by a person who becomes a surety on the official bond of the teller of such bank, do not bind the bank, nor relieve the surety from liability for the defalcations of such teller, when such reports have no relation to such suretyship, and do not disclose whether such teller is honest or dishonest. (Lieberman v. First Nat. Bank, 414.)

3. OFFICERS—SURETIES—CONCEALED FRAUD OF PRINCIPALS—STATUTE OF LIMITATIONS.—In actions on official bonds, concealed fraud on the part of the principal deprives both principal and surety of the benefit of the statute of limitations. Such statute does not begin to run until the fraud is discovered. (Lieberman v. First Nat. Bank, 414.)

See Constables; Process, 2.

PARDON.

1. PARDONING POWER — CONDITIONS. — The pardoning power conferred by a state constitution upon the governor includes the power to grant conditional pardons, the condition to be either precedent or subsequent, and of any nature so long as it is not illegal, immoral, or impossible of performance. A breach of the condition avoids and annuls the pardon. (Fuller v. State, 17.)

2. PARDONING POWER—PAROLE OF PRISONERS—CONSTITUTIONAL LAW.—The parole of a convict is in the nature of a conditional pardon and within the constitutional grant of the pardoning power to the governor. The legislature may enact law to render its exercise convenient and efficient. Hence the legislature has power to enact a law providing that the governor may suspend sentence, and parole convicts on good behavior, and that if a convict fails to observe the terms of his parole he may be rearrested and required to serve out his sentence. (Fuller v. State, 17.)

3. PARDONING POWER—PAROLE—BREACH OF CONDITION.—Under a statute providing that a paroled convict, upon the failure to observe the conditions of his parole, may be rearrested and required to carry out the sentence of the court as though no parole had been granted, he may, even after the time at which the sentence would have been ended but for its suspension, be remanded to custody that the unserved part of the sentence may be executed upon him. (Fuller v. State, 17.)

4. PARDONING POWER—BREACH OF PAROLE—SUMMARY REARREST.—A statute providing for the parole of convicts upon good behavior, and authorizing the governor to determine whether the condition of the parole has been complied with, and to order a summary arrest, is not unconstitutional. The convict is at large by the mere grace of the executive, having accepted the executive clemency upon conditions. Upon the breach of those conditions the parole is avoided and he becomes merely an escaped convict. (Fuller v. State, 17.)

PAROLE OF PRISONERS.

See Pardon.

PARTIES.

PLEADING—DEFECT OF PARTIES—WAIVER.—A defect of parties, patent upon the face of a complaint, is waived by making no objection thereto. (Fred Miller Brew. Co. v. Capital Ins. Co., 529.)

See Appeals, 7.

PARTITION.

See Dower.

PASSENGERS.

See Carriers; Elevators.

PAYMENT.

PLEADING—PAYMENT.—If an issue is formulated by the allegation of an amount due and a denial thereof, evidence tending to prove payment is admissible, though payment was not specially pleaded as a defense. (Robertson v. Robertson, 756.)

PEDDLER'S TAX.

See Constitutional Law, 7.

PERJURY.

1. **PERJURY—INSUFFICIENT INDICTMENT.**—Perjury can be committed in testifying at a trial upon an indictment which is finally adjudged insufficient. (State v. Rowell, 918.)

2. **PERJURY—WHAT NOT.—IN AN EXTRAJUDICIAL PROCEEDING** which is wholly void, where an oath cannot lawfully be administered, perjury by falsely testifying cannot be committed. (State v. Rowell, 918.)

3. **PERJURY—NATURE OF PROSECUTION FOR.**—A prosecution for perjury is not grounded upon the injury or inconvenience which an individual or the public may sustain, but upon the abuse and insult to public justice. (State v. Rowell, 918.)

4. **PERJURY—INDICTMENT—SUFFICIENCY OF.**—An indictment for perjury may recite the alleged false testimony to show the crime, but where a great mass of testimony is thrown into an indictment without pointing out in what answers to questions the alleged perjury is contained, the indictment is bad for uncertainty. (State v. Rowell, 918.)

PHYSICIANS.

1. **PHYSICIANS—ACTION FOR SERVICES OF—EVIDENCE.** In an action by a physician to recover for medical services rendered to a person since deceased, the statement by such physician as a witness that he knew such deceased, that he had a certain disease and that he died from the effects of that disease, complicated with another, involves no transaction with the deceased, and is not within any exception to the competency of parties to a suit as witnesses. (Morrisett v. Wood, 127.)

2. **PHYSICIANS—ACTION FOR SERVICES—VALUE OF PATIENT'S ESTATE.**—In an action by a physician to recover for services rendered to a person since deceased, evidence as to the value of the decedent's estate is not admissible, unless a recognized usage in the community is shown to graduate professional charges with reference to the financial condition of the person receiving such services, which has been so long established and universally acted upon as to have ripened into a custom of such character that it may be considered that such services were rendered and accepted in contemplation of it. (Morrisett v. Wood, 127.)

3. **PHYSICIANS—ACTION FOR SERVICES—VALUE OF PATIENT'S ESTATE.**—In an action by a physician to recover for professional services rendered to a person since deceased, a hypothetical question expounded to an expert witness to prove the value of such services is objectionable, if one of its postulates is the value of such deceased patient's estate. (Morrisett v. Wood, 127.)

PLEADING.

1. **PLEADING—VERIFICATION.**—If the real issue in a case is one of law, the petition must be regarded as a mere pleading, as is the answer also, and the fact that the petition is sworn to, while the answer is not, is immaterial. (Musgrove v. Gray, 124.)

2. **PLEADING—NECESSARY FACTS.**—It is not permissible, in either civil or criminal pleading, to leave a fact necessary to be averred to be inferred from an allegation of a mere conclusion of law. (Gunning v. People, 433.)

3. PLEADING—DEMURRER FOR MISJOINDER—CASE AND ASSUMPSIT.—It is not allowable to join a count in case with one in assumpsit, and such defect may be taken advantage of by a demurrer for a misjoinder of counts. (*Morris v. Eufaula Nat. Bank*, 95.)

4. PLEADING.—A PLEADER IS NOT CONCLUDED by the averment of a legal inference, if such inference is repugnant to the true legal conclusion to be drawn from the state of facts alleged in the same pleading. (*Salem v. Lane*, 481.)

5. PLEADING.—AVERMENTS IN PLEADING ARE NOT SHAM, where they are not false in fact or pleaded in bad faith. (*Miser v. O'Shea*, 751.)

6. PLEADING—AMENDMENTS ALLOWABLE.—In an action by attachment it is proper to permit the plaintiffs to amend their complaint by adding new parties plaintiff, and by changing the capacity in which the plaintiffs sue from individuals to assignees. (*Blankenship v. Blackwell*, 175.)

7. PLEADING—FATAL VARIANCE.—As the substance of an issue must be proved, any departure in the evidence from the substance constitutes a variance and is fatal. (*Johnson v. Whitfield*, 196.)

8. EQUITY—RELIEF UNDER GENERAL PRAYER.—If a bill in chancery contains a general prayer for relief, it is regarded as sufficient to support any decree warranted by the facts alleged. (*Shields v. Bush*, 474.)

9. EQUITY—RELIEF UNDER GENERAL PRAYER.—If a bill in chancery prays that a deed to a homestead and farm property be set aside, or if such relief cannot be granted that the court construe the deed and determine whether any title or estate passed thereby, the court may, on setting aside the deed as to the homestead, declare it valid as to the farm property, although no cross-bill is filed. (*Shields v. Bush*, 474.)

10. EQUITY—MULTIFARIOUSNESS.—A demurrer to a bill in equity to compel the determination of claims, and to quiet the title to land on the ground of multifariousness, in "that it seeks in one bill to quiet the titles of a number of different persons to distinct tracts of land, each of the defendants claiming separate lands without showing that the several defendants have a joint or common interest in any portion whatever," is not a speaking demurrer, but raises the objection of multifariousness. (*Slosson v. McNulty*, 222.)

11. EQUITY—BILLS AGAINST SEVERAL PERSONS TO QUIET TITLE.—If a bill to compel the determination of claims and to quiet the title to a very large tract of land alleges that the claimants acquired title thereto from three separate and distinct sources, and, after making many persons parties respondent, alleges "that each of the defendants claim, or are reputed to claim, some right, title, or interest in or encumbrance upon said land, or some part thereof," but without alleging that the several defendants have any joint or common interest in such lands or any portion thereof, is multifarious. (*Slosson v. McNulty*, 222.)

12. EQUITY—MULTIFARIOUSNESS OF BILLS.—To render a bill in equity multifarious as to subject matters, there must be different grounds of suit alleged, and each ground must be sufficient to sustain a bill. The prayer must also be looked to in testing the character of the bill, but the prayer alone, not supported by averments, though it be for alternative or different or inconsistent kinds of relief, does not make the bill multifarious. (*Boutwell v. Vandiver*, 149.)

13. EQUITY.—PRAYERS for relief in a bill of equity having no basis in averments of fact may be disregarded, but are not ground for demurrer to the whole bill. (Boutwell v. Vandiver, 149.)

14. EQUITY—DEMURRER TO BILL.—Facts alleged which are immaterial to the case made by a bill in equity may be subject to exception or motion to strike out, but are not subject to demurrer segregating them from other parts of the bill. (Boutwell v. Vandiver, 149.)

15. EQUITY—DISMISSAL OF BILL IN VACATION.—While a bill in equity should never be finally dismissed by decree in vacation, on motion to dismiss for want of equity, without first giving complainant an opportunity to amend, the reason for the rule ceases when it is manifest that the bill cannot be amended without entire departure so as to give it equity. (Neville v. Kenney, 230.)

See Limitation of Actions, 1-3; Payment.

PLEDGE.

See Executors and Administrators, 1-4

POLICE POWER.

See Monopolies, 2

PRESCRIPTION.

See Adverse Possession, 9; Records, 8.

PROCESS.

1. JURISDICTION—MOTION TO DISMISS—ORAL EVIDENCE.—Where it appears from the writ and is conceded that the date of the writ has been altered, oral evidence, upon a motion to dismiss for want of jurisdiction, is admissible to show the true date of the writ. (Sartwell v. Sowles, 943.)

2. VOID PROCESS—WRIT OF POSSESSION—JUSTIFICATION.—Where it appears from a writ of possession that the judgment on which it was issued was rendered by a justice of the peace, and that it was for the plaintiff to recover his title and possession of the land in question, the writ, showing a judgment without the jurisdiction of the justice, is void on its face, and affords no protection to anyone acting under it. (Sartwell v. Sowles, 943.)

QUIETING TITLE.

EQUITY—BILLS TO QUIET TITLE—WHAT PROPERLY CONTAINED IN PRAYER.—In a bill in equity to compel the determination of claims and to quiet the title to land, a demand upon the defendant to "set forth and specify his title, claim, interest, or encumbrance" in and to or upon such land is sufficiently and properly made in the prayer of the bill. (Slosson v. McNulty, 222.)

See Pleading, 11.

RAILROADS.

1. RAILROAD PURPOSES—HOTEL OR EATING-HOUSE.—Whether a certain hotel or eating-house is maintained for railroad purposes is largely a mixed question of law and fact, to be determined from the circumstances of each particular case. If it appears to be reasonably necessary for the convenience of the em-

ployés and passengers of the railway company, its maintenance is a legitimate railroad purpose; but if it is kept for the accommodation of the general public, and not as an incident to the operation and management of the railway, it cannot be so considered. (*Abraham v. Oregon etc. R. R. Co.*, 779.)

2. RAILROADS—REFUSAL TO TRANSPORT PLAINTIFF—COMPLAINT—DEMURRER.—Where a plaintiff is entitled to transportation over the defendant's road on a ticket for which he contracted and paid, but through the negligence of the defendant's agent the ticket fails to show such right, and the defendant refuses to transport him, a complaint which alleges such breach of duty and that the plaintiff has used due care, entitles him to nominal damages at least, and a demurrer cannot be sustained on the ground that the allegations of the complaint do not show any damages to the plaintiff for which he can sustain an action. (*Holden v. Rutland R. R. Co.*, 926.)

3. RAILROADS—FORM OF ACTION—CASE.—Where a railroad company is under a duty to deliver to a plaintiff such a ticket as will entitle him to transportation upon presentation on its train, he can maintain an action on the case for the damages accruing to him from a breach of such duty. (*Holden v. Rutland R. R. Co.*, 926.)

4. STREET RAILWAYS—WRONG TRANSFER—RIGHTS OF PASSENGER.—It is the duty of a street-car passenger, if the transfer slip tendered by him as fare is refused, to either pay fare or leave the car at the request of the conductor. If the passenger refuses so to do and sustains injury in resisting expulsion from the car, he cannot recover therefor, except upon proof that more force was used than was reasonably necessary. (*Kiley v. Chicago City Ry. Co.*, 460.)

5. STREET RAILWAYS—WRONG TRANSFER—EXPULSION—REMEDY.—If a street-car passenger, on the transfer slip tendered by him as fare being refused, pays his fare or leaves the car at the request of the conductor, and the mistake in the transfer is the fault of the company, the passenger is entitled to recover the cost of his fare, such damages as he sustained on account of the delay caused by the expulsion, all additional expense necessarily occasioned thereby, together with reasonable damages for the indignity in being expelled from the car. (*Kiley v. Chicago City Ry. Co.*, 460.)

6. RAILROADS—NEGLIGENCE IN SPEED OF TRAIN.—The running of a railway train at night at the rate of sixty miles an hour, greatly in excess of the speed required by schedule time, over a curved track where objects can be seen not more than one hundred feet, is negligence, rendering the company liable for injury to a passenger caused by the derailment of such train as the result of striking a cow. (*St. Louis etc. Ry. Co. v. Stewart*, 311.)

7. RAILROADS—NEGLIGENCE.—The care required by railroad carriers of passengers is the highest practicable care which capable and faithful railroad men would exercise in similar circumstances. They are liable for the slightest negligence. (*St. Louis etc. Ry. Co. v. Stewart*, 311.)

8. NEGLIGENCE—TRESPASSERS.—A railroad company owes the duty of ordinary care to any person of any age who enters upon one of its trains as a trespasser. This is especially true of children of tender years. (*Enright v. Pittsburg Junction R. R. Co.*, 795.)

9. NEGLIGENCE—TRESPASSING CHILD.—If a trespassing child of tender years on a freight train, frightened by the threaten-

ing acts of a brakeman, jumps from the train while it is in rapid motion, he may recover for injuries sustained thereby, as the company is guilty of negligence. (*Enright v. Pittsburg Junction R. R. Co.*, 795.)

10. NEGLIGENCE—CHILDREN—TRESPASSERS.—If the jury find from the evidence that defendant's servant in charge of shifting cars saw a young boy who was injured in a place of danger on one of such cars, and failed to make any effort to prevent him from exposing himself to such danger, and that the signaling brakeman on the car attached to or pushed by the shifting engine saw, or from his position should have seen, the boy in a place of danger on one of the cars he was approaching in time to avoid the danger, or give warning of it, and that he made no effort to avoid the danger or warn the boy, it is justified in finding the defendant guilty of such negligence as would render him liable. (*Tully v. Philadelphia etc. R. R. Co.*, 425.)

11. NEGLIGENCE — CHILDREN — TRESPASSERS.—If it is shown that a young boy injured by shifting cars was actually seen in a place of danger by the servants of the defendant in time to avoid his injury, it is immaterial whether he and other boys were or were not accustomed to be upon the empty cars of the defendant. (*Tully v. Philadelphia etc. R. R. Co.*, 425.)

12. RAILROADS—TRESPASSERS—PRESUMPTION.—When a railroad company is sued for personal injuries and the complaint does not show whether the plaintiff was a passenger or employé, or that he had any connection with the defendant, at the time of the injury, it will be presumed that he was a trespasser. (*Highland etc. R. R. Co. v. Robbins*, 153.)

13. RAILROADS—TRESPASSERS—LIABILITY FOR INJURY TO.—If an adult sues a railroad company for personal injuries, and the complaint affirmatively shows him to have been a trespasser, an actionable injury is not shown unless it is averred to have been done wantonly or intentionally, or that the company's employés failed to use due care to avoid injuring him after he was discovered, and his peril of injury became apparent, or that such conditions existed, as to time and place, as made it necessary for the trainmen to keep a lookout. (*Highland etc. R. R. Co. v. Robbins*, 153.)

14. RAILROADS—TRESPASSERS—DUTY AS TO.—A railroad company is not bound to keep a lookout for trespassers on the track of its road, but a duty to such a trespasser sets in when his peril becomes apparent to the company's employés, who must then exercise all reasonable care and diligence to avoid injuring him. (*Highland etc. R. R. Co. v. Robbins*, 153.)

15. RAILROADS—INJURIES FROM GREAT SPEED IN DENSELY POPULATED DISTRICTS.—Where trainmen have reason to believe that persons are likely to be on the track at points where people frequently pass, whether in cities or in densely populated neighborhoods in the country, in such numbers as to make dangerous the rapid running of trains without warning, the railroad company is answerable for an injury to a person, resulting from a high speed maintained under such circumstances and conditions. Under such circumstances, reckless indifference of consequences must be imputed to the trainmen, and the company is liable, not because its servants ought to have sooner observed the danger, but on the ground that they knew of its existence, from their knowledge of the presence of people at the place, as a matter of fact, without seeing them at all in the particular instance. (*Highland etc. R. R. Co. v. Robbins*, 153.)

16. RAILROADS—TRESPASSERS.—ONE WHO CROSSES railroad track, whether in a town or in the country, is not a trespasser. (Highland etc. R. R. Co. v. Robbins, 153.)

17. RAILROADS — TRESPASSING CHILDREN — LOOKOUT FOR.—A railroad company is not bound to keep a lookout for children who are trespassers on its track. (Highland etc. R. R. Co. v. Robbins, 153.)

18. NEGLIGENCE—RIGHT TO CROSS RAILROAD TRACK.—A person who has a right to go upon a railroad track for the mere purpose of crossing it on his way home must exercise such right immediately after his ascertaining by his stopping sufficiently long to look and listen to see that he could proceed with safety to himself. He has no right to linger upon or walk along the track, or upon the right of way of the railroad company in dangerous proximity to the track. By so doing he becomes a trespasser, and cannot recover for an injury caused by the negligence of the railroad company while he is thus a trespasser. In such case the burden of proof is upon the party injured to show that he was in the exercise of his right of immediately crossing the track, and that the acts of negligence alleged by him on the part of the railroad company were the proximate cause of the injury. (Tennessee etc. R. R. Co. v. Hansford, 241.)

19. NEGLIGENCE—RIGHT TO CROSS RAILROAD TRACK—EMPLOYEE IN ANOTHER BRANCH OF SERVICE.—In an action against a railroad company to recover for personal injury alleged to have been caused by the negligence of the company in failing to have a headlight on its locomotive, and in failing to give signals of its approach, the fact that the person injured who was on the track at the time was employed by the company in another and distinct branch of its service does not necessarily impose any greater duty upon the company at the time and place of the accident than that due to any other person upon the track. (Tennessee etc. R. R. Co. v. Hansford, 241.)

20. NEGLIGENCE—RIGHT TO CROSS RAILROAD TRACK—DUTY TO STOP, LOOK, AND LISTEN.—If in an action against a railroad company to recover for personal injury received in an attempt to cross the railroad track it clearly appears that if the person injured had stopped to look and listen before attempting to cross the track there was nothing to prevent his seeing the approaching locomotive and saving himself from injury, he must be deemed guilty of negligence, barring his recovery. If he did not stop and look and listen, or if he did, and then attempted to cross immediately in front of the approaching locomotive, he was guilty of negligence which would bar a recovery. (Tennessee etc. R. R. Co. v. Hansford, 241.)

21. NEGLIGENCE—RIGHT TO CROSS TRACK—EVIDENCE.—In an action against a railroad company to recover for personal injury received in attempting to cross the railroad track, the facts as to whether many persons crossed the track at the point of the accident, the time of such crossing, whether there was a headlight on the engine, or the bell was rung or a whistle blown at the time of the injury, and whether such witnesses had an opportunity to see and hear the facts above stated, are all pertinent to the inquiry, and admissible in evidence. (Tennessee etc. R. R. Co. v. Hansford, 241.)

22. RAILROADS—NEGLIGENCE—BURDEN OF PROOF.—If a person is killed by a railroad train at a crossing, the burden of showing that he knew of the approach of the train, although it did not give the statutory signals, is upon the railroad company. (Nohrden v. Northeastern R. R. Co., 826.)

23. RAILROADS—NEGLIGENCE.—It does not necessarily follow that the fact that a person injured by a railroad train at a crossing knew of the approach of the train in time to avoid the collision implies gross negligence on his part, so as to bar a recovery. (*Nohrden v. Northeastern R. R. Co.*, 826.)

24. NEGLIGENCE ON ELECTRIC RAILWAY CAUSING DEATH—QUESTION FOR JURY.—Where a person, while riding in a cutter on a street railway track, from which a considerable body of snow had been cleared by throwing it upon the driveways on either side, was run down and injured by an electric-car coming up behind the cutter at such a high rate of speed as to give the driver little opportunity to escape a serious accident, the fact that the car did not strike the cutter does not necessarily relieve the railway company from a charge of negligence, where the jury might have found upon the evidence that the driver, in his effort to avoid instantaneous disaster was compelled to turn rapidly to the right; that, while he succeeded in clearing the track, he upset the cutter in attempting to drive over a ridge of ice and snow lying between the track and the highway; and that an occupant of the cutter was thrown out when it tipped over, and was killed in consequence of being struck by the step or snow-scraper on the rear end of the car. (*Countryman v. Fonda etc. R. R. Co.*, 640.)

25. ELECTRIC RAILWAY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—When a person, during wintry weather, is driving in a cutter on a street railway track, over which electric cars ordinarily pass every one-half hour, but a longer time elapses between cars during wintry weather, the degree of alertness required of the driver to prevent an accident is a question for the jury. (*Countryman v. Fonda etc. R. R. Co.*, 640.)

See Carriers.

RECEIPTS.

See Warehousemen.

RECEIVERS.

WRITS OF ASSISTANCE—RECEIVERS.—The receiver of a dissolved corporation is not entitled to a summary writ of assistance to recover possession of property belonging to the corporation from persons who are not parties to the pending suit involving the appointment of the receiver, and who in good faith deny his right to the possession of the property, they claiming it under contract with the corporation. (*Musgrove v. Gray*, 124.)

RECORDS.

1. RECORDING OF INSTRUMENTS—MUST BE IN THE PROPER BOOK.—If the grantee of an interest in land would protect himself against subsequent purchasers or encumbrancers, he must give notice of his interest, either actual or constructive; and in giving constructive notice, it is incumbent upon him to comply with all the statutory requirements prescribed for such notice, one of which is the correct transcription of the instrument into the appropriate book. (*Cady v. Purser*, 391.)

2. RECORDING OF INSTRUMENTS.—A RECORDER IS THE AGENT OF THE PERSON WHO RECORDS AN INSTRUMENT, for the purpose of correctly transcribing it into the appropriate book

of record, and errors or omissions of the former in making such transcription are, in law, the errors and omissions of the latter. (Cady v. Purser, 391.)

3. RECORDING OF INSTRUMENTS—TITLES BY PRESCRIPTION.—The provisions of the recording act are not limited to titles which appear of record, but are applicable as well to those which exist by virtue of prescription. (Cady v. Purser, 391.)

REPLEVIN.

1. REPLEVIN—BOND WITH VOID CONDITION.—If property is attached, and replevied, but judgment is rendered in the attachment suit and the property condemned before a replevy bond is executed, which fact is unknown to the sheriff and obligors in the bond when it is executed and the property is delivered by the sheriff to the obligors therein, this does not render the bond void. Upon its execution a present debt immediately arose from the obligors to the obligees therein, and the fact that its condition is incapable of performance does not destroy the obligation or indebtedness thereby created, but only renders the condition void; and the plaintiff's right of action on the bond arose immediately upon the execution thereof. (Ward v. Hood, 205.)

2. REPLEVIN—SUIT ON BOND.—THE PROPER MEASURE OF DAMAGES in a suit on a replevy bond is the value of the property with interest thereon. (Ward v. Hood, 205.)

RES GESTÆ.

See Evidence, 16; Negligence, 20.

RES JUDICATA.

See Judgment, 15-24.

REVENUE STAMPS.

See Evidence, 26-28.

REVIEW, WRIT OF.

See Writ of Review.

SALES.

1. CONDITIONAL SALES—PAYMENT—RENEWAL NOTES.—If goods are sold with reservation of title in the vendor until the purchase notes are paid, the execution of renewal notes for such debt is not a payment unless made so by agreement of the parties. (Triplett v. Mansur etc. Co., 284.)

2. CONDITIONAL SALES—VALIDITY.—A condition in the sale of goods that if resold by the vendee before fully paid for they are to be sold as the property of the vendor, who is to retain the proceeds of such sale, is valid. (Triplett v. Mansur etc. Co., 284.)

3. CONDITIONAL SALES—BONA FIDE PURCHASER.—If goods are sold with reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser from the vendee obtains no title, though he buys in good faith for a valuable consideration, without notice of such condition. (Triplett v. Mansur etc. Co., 284.)

4. SALES OF PERSONALTY OF WHICH VENDOR IS NOT IN POSSESSION—IMPLIED WARRANTY OF TITLE.—On the

He, at a fair price, of personal property in the possession of the vendor, the law implies a warranty of title; but if it is in the possession of a third person at the time of the sale, no such warranty is implied. (Balte v. Bedemiller, 737.)

5. SALES.—IF THE VENDOR OF PERSONAL PROPERTY REPRESENTS HIMSELF TO BE ITS OWNER, this is tantamount to a warranty of title, though he is not in possession. (Balte v. Bedemiller, 737.)

6. DAMAGES FOR BREACH OF WARRANTY OF TITLE—ATTORNEY'S FEE.—If a purchaser of personal property unsuccessfully defends the title thereto, which has been warranted to him, against an action brought by a third person, of which the vendor had notice, the purchaser is entitled to recover from the vendor, as part of his damages, the fee paid his attorney for making the defense. (Balte v. Bedemiller, 737.)

7. SALE—WARRANTY OR CONDITION—DESCRIPTION.—Where canned peas are sold by a particular description, the quality being ascertainable by inspection, such description is a part of the contract of sale, a condition precedent to the purchaser's liability, and does not constitute an implied warranty of quality. (Waeber v. Talbot, 712.)

8. SALE—GOODS NOT CORRESPONDING WITH CONTRACT—RIGHT TO RECOVER DAMAGES.—The right of a vendee to recover damages on the ground that the article furnished fails to correspond with the contract does not survive the acceptance of the goods by the vendee after opportunity to ascertain the defect. (Waeber v. Talbot, 712.)

9. SALE.—AN IMPLIED WARRANTY OF THE MERCHANTABILITY of goods survives their acceptance only where the latent defects were not discoverable upon inspection. (Waeber v. Talbot, 712.)

10. SALE—RESCISSION OF CONTRACT.—The right to rescind a contract for the purchase of goods, where they are not as agreed, must be exercised promptly and in good faith. (Waeber v. Talbot, 712.)

11. SALE—FAILURE TO COMPLETE—VENDOR'S REMEDIES.—When the vendee of personal property, under an executory contract of sale, refuses to complete his purchase, the vendor may keep the article for him and sue for the entire purchase price; or he may keep the property as his own and sue for the difference between the market value and the contract price; or he may sell the property for the highest sum he can get, and, after crediting the net amount received, sue for the balance of the purchase money. (Ackerman v. Rubens, 728.)

12. SALE TO ONE'S SELF—PUBLIC AUCTION—EVIDENCE OF VALUE OF PROPERTY.—A vendor of personal property, upon the vendee's refusal to complete his purchase, may sell the property for the highest sum he can get, and sue for the balance of the purchase money; and where the vendor himself purchases the property at public auction sale fairly conducted upon notice to the vendee, with no suspicion of fraud or undue advantage, the amount paid is legal evidence of the value of the property, and the direction of a verdict for nominal damages only is reversible error. (Ackerman v. Rubens, 728.)

See Bailments, 2; Fixtures, 1.

SANITARY DISTRICT.

See Counties.

SCALES.

See Fixtures, 2.

SETOFF AND COUNTERCLAIM.

1. COUNTERCLAIM — ONE TRESPASS AGAINST ANOTHER.—A counterclaim must be connected with the subject of the suit, and one independent trespass cannot be used as a set-off against another consequent upon it. (*Miser v. O'Shea*, 751.)

2. COUNTERCLAIM — CONNECTION WITH SUIT — INDEPENDENT TRESPASS.—If the owner of a placer mining claim runs debris down upon another, and the owner of the lower claim brings an action for damages, and to enjoin the upper owner from so depositing his debris, a counterclaim for damages for an injury to the defendant's claim by water backed up thereon from a dam built across the creek by the plaintiff below the defendant's claim is not connected with the subject of the suit, but arises from an independent trespass. Hence, there is no error in sustaining a demurrer to a complaint setting up such a defense. (*Miser v. O'Shea*, 751.)

SLOT MACHINES.

See Gambling Contracts.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—JUDICIAL DISCRETION.—The right to specific performance may be granted or withheld upon a consideration of all the circumstances and in the exercise of sound discretion. (*Winne v. Winne*, 647.)

2. SPECIFIC PERFORMANCE OF AGREEMENT TO MAKE ONE AN HEIR.—When for any reason the enforcement of an agreement to make one an heir must be unfair, inequitable, or unjust, specific performance thereof should be denied. (*Winne v. Winne*, 647.)

3. SPECIFIC PERFORMANCE.—THE FACT THAT AN ACTION AT LAW cannot be maintained upon an agreement does not prevent a court of equity from enforcing it by specific performance. (*Winne v. Winne*, 647.)

4. SPECIFIC PERFORMANCE OF AGREEMENT TO MAKE ONE AN HEIR—WHEN PROPER.—If a childless woman enters into a written agreement with a boy's mother, for the benefit of the boy, who is an infant, to take the custody and control of the child, to keep, maintain, and educate him as her own, and, at her death, to give him all her property, "and make him her sole heir," if his mother will surrender to her his custody and control, and will have nothing more to do with him, the infant is entitled to a specific performance of the contract, where it has been fully performed by the boy and his mother and the promisor die intestate. (*Winne v. Winne*, 647.)

5. SPECIFIC PERFORMANCE—CONTRACT TO MAKE ONE AN HEIR.—An agreement made by a childless woman to maintain another's boy as her own child, and at her death to give the boy her property, is not impossible of performance because of the addition to the words, "and make him her sole heir." (*Winne v. Winne*, 647.)

SPENDTHRIFT TRUSTS.

See Trusts, 8, 9.

STATUTES.

1. STATUTES—PENAL—WHAT ARE.—The prime object of every statute, strictly penal, is to enforce obedience to the mandates of the law by inflicting punishment upon those who disregard them. In such statutes the provision for punishment never rests in uncertainty, and is never based upon a contingency. (*Nebraska Nat. Bank v. Walsh*, 301.)

2. STATUTES—WHETHER PENAL OR REMEDIAL.—Statutes giving the remedy to the party aggrieved are never regarded as penal, but remedial, even though such party is given damages beyond indemnity, or mere compensation. (*Nebraska Nat. Bank v. Walsh*, 301.)

3. PENAL STATUTES—WHERE ENFORCEABLE.—Penal statutes are not enforceable in other states than the ones in which they are enacted. (*Farr v. Briggs*, 930.)

4. STATUTES OF SISTER STATE.—THE CONSTRUCTION given by the courts of one state to its own constitution and statutes will, under all ordinary circumstances, be followed by the courts of a sister state. (*Fred Miller Brew. Co. v. Capital Ins. Co.*, 529.)

STATUTE OF FRAUDS.

STATUTE OF FRAUDS—WAIVER OF DEFENSE.—The defense that a contract is within the statute of frauds is waived by allowing it to be established by parol evidence without objection. (*Sartwell v. Sowles*, 943.)

See Constitutional Law; Evidence, 7.

STOCK EXCHANGE.

CAPITAL INVESTED IN BUSINESS.—THE VALUE OF A SEAT IN THE NEW YORK STOCK EXCHANGE is capital invested in business in that state, since such seat is essential to successfully carry on the business of a broker. (*People ex rel. Lemon v. Feltner*, 698.)

See Taxation, 1.

STREET RAILWAYS.

See Railroads.

SURETYSHIP.

1. SURETYSHIP—EXTENSION OF TIME OF PAYMENT.—If the principal in a note, at or after maturity, contracts with his creditor for delay in full payment, without the knowledge of the sureties, in consideration for paying part of the indebtedness, the contract is without consideration, and neither binds the creditor nor discharges the sureties. It is immaterial that such payment is made the day before the maturity of the note, when the contract of the holder and principal in the note is that the payment shall be made at its maturity. (*Sully v. Childress*, 875.)

2. SURETYSHIP—RELEASE OF SURETY.—If a person becomes surety on a contract to enable his principal to raise money with which to operate a business, the surety is released from liability, if the person furnishing the money has knowledge of the purposes of the contract, and without the knowledge of the surety, and without intentional fraud, applies a portion of the money

thus raised to the payment of a pre-existing debt of the principal (Gano v. Farmers' Bank, 596.)

See Executors and Administrators, 29; Guaranty; Officers, 14

TAXATION.

1. TAXATION—MEMBERSHIP IN STOCK EXCHANGE.—A seat in the New York Stock Exchange, while property in a certain sense, is not such personal property as is taxable under the statutes of New York if owned by a resident, and it is not taxable when owned by a nonresident, under a statute providing that the personal property of nonresidents is taxed "to the same extent" as if owned by a resident. (People ex rel. Lemmon v. Feltner, 608.)

2. TAXES—PERSONAL OBLIGATION OF OWNER—PAYMENT OF TAXES—HOW ENFORCED.—There is no personal obligation upon the owner of land for the taxes levied against it and made a lien thereon, and the payment of such taxes can be enforced only by a sale of the land in the mode prescribed by statute. (McPike v. Heaton, 335.)

3. TAXES—RECOVERY OF AMOUNT PAID FOR—IMPLIED COVENANT.—A SUCCEEDING GRANTEE who has paid taxes which were a lien on the land preceding the date of the first grant cannot maintain an action for the amount so paid, against the first grantor, upon the covenant implied from his deed of grant that the land was free of taxes. (McPike v. Heaton, 335.)

See Covenants, 5.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—DUTY OF SENDER OF MESSAGE—PROTECTION FROM LOSS.—The sender of a telegraph message is under no obligation to protect himself from loss on account of the negligence of the telegraph company, where it does not appear that he knew that he could protect himself. (Western Union Tel. Co. v. Chamblee, 89.)

2. TELEGRAPH COMPANIES—REPEATING MESSAGE FOR SENDER.—The sender of a telegraph message is under no duty to ascertain whether or not the sendee of the message has received it correctly. (Western Union Tel. Co. v. Chamblee, 89.)

3. TELEGRAPH COMPANIES—DUTY TO SEND MESSAGES.—A telegraph company, in accepting a message for transmission, is under obligation to transmit it correctly and without delay, though it is not an insurer against all accidents. (Western Union Tel. Co. v. Chamblee, 89.)

4. TELEGRAPH COMPANIES—REPEATING MESSAGE—REGULATION OF COMPANY.—A stipulation upon the back of a telegraph message that the company is released from all damages, if mistakes occur in the transmission, unless the sender requires the message to be repeated, is an unreasonable regulation and void. (Western Union Tel. Co. v. Chamblee, 89.)

TORTS.

See Actions; Joint Liability.

TRADE NAMES.

1. TRADE NAME CANNOT BE USED IN ANOTHER BUSINESS.—The mere use of a trade name in one business does not

give a party a right to its use in any other business. (Nolan Bros. Shoe Co. v. Nolan, 346.)

2. **TRADE NAME—USE OF, IN DIFFERENT BUSINESS—INJUNCTION.**—The use of the trade name "Nolan Bros." by one of the brothers, engaged for ten years in the wholesale shoe business, and by another brother engaged in the retail shoe business for over twenty years, does not give a successor to the former business, who has closed it out and established a retail shoe business, the right to use the same trade name in the latter business, and he may be enjoined by the retail dealers from such use, though they did not object to his use of the name in the wholesale business. The two businesses are separate and distinct. (Nolan Bros. Shoe Co. v. Nolan, 346.)

3. **TRADE NAME—ABANDONMENT OF—WHAT IS NOT.**—The temporary disuse of a trade name, or even the temporary use of an additional trade name in connection with it, does not show an abandonment thereof. (Nolan Bros. Shoe Co. v. Nolan, 346.)

4. **TRADE NAME MAY BE EMBODIED IN CORPORATE NAME.**—Those entitled to use a trade name in a business may incorporate and embody the trade name in the name of the corporation, which may enjoin any infringement of the trade name. (Nolan Bros. Shoe Co. v. Nolan, 346.)

5. **TRADE NAME—FAMILY NAME—"NOLAN BROS."**—An objection to the use of the name "Nolan Bros." is not an objection to the use of the family name "Nolan." The name "Nolan Bros." may be used as a trade name and be protected as such. (Nolan Bros. Shoe Co. v. Nolan, 346.)

TRANSFER TICKETS.

See Railroads, 4, 5.

TRIAL.

See Instructions.

TROVER AND CONVERSION.

TROVER AND CONVERSION — MEASURE OF DAMAGES. In actions of trover for the conversion of personalty, chiefly or exclusively valuable to the owner by reason of associations or otherwise, the actual value to him, and not the market value, is the measure of damages, and these should be estimated with reasonable consideration of, and sympathy with, the feelings of such owner. (Bateman v. Ryder, 910.)

TRUSTS.

1. **TRUSTEE—PERSONAL LIABILITY.**—One in whom a legal estate is vested, and who acts for himself in managing it, may be held personally liable upon dealings with third parties relative to the estate, notwithstanding that in such dealings he designates himself "trustee." (McIntyre v. Williamson, 929.)

2. **TRUSTEE—PERSONAL LIABILITY—ACTING FOR ESTATE.**—A trustee may be held personally liable upon dealings in behalf of the trust estate, and within the limits prescribed by law, and the fact that the parties with whom he dealt knew of the trust and that he was dealing on its account will not protect him. (McIntyre v. Williamson, 929.)

3. TRUSTEE—HOW RELIEVED FROM PERSONAL LIABILITY.—A trustee, in transactions relating to the trust, can relieve himself from personal liability only by a definite understanding that the transactions were had upon some other responsibility. (*McIntyre v. Williamson*, 929.)

4. TRUSTEES—RULES OF AGENCY INAPPLICABLE TO: The rules which determine the liability of an agent are not applicable to trustees. (*McIntyre v. Williamson*, 929.)

5. TRUST DEED SECURING MANY BONDS—COUPON HOLDER'S RIGHT OF ACTION.—If a deed of trust has been given to secure many bonds and coupons, and the holder of matured unpaid coupons requests the trustee to bring suit thereon, which he refuses to do, the holder may sue the company thereon, without a prior demand, although the trustee may be justified, under the terms of the deed, in his refusal. (*Citizens' Bank v. Los Angeles Iron etc. Co.*, 341.)

6. TRUST DEED SECURING MANY BONDS—SUIT BY COUPON HOLDER—COMPLAINT.—When a deed of trust has been given to secure many bonds, and the holder of matured, unpaid coupons requests the trustee to bring suit thereon, which he refuses to do, and the holder brings suit to foreclose the deed of trust, his complaint, alleging that he owns certain bonds and coupons so secured, but that he is ignorant of the number of bonds outstanding and of the owners thereof, is not so uncertain as to justify a reversal of judgment for the plaintiff on the ground that he failed to allege, in his complaint, that he made known to the trustee the number of bonds held by him when demanding that the trustee should bring suit. (*Citizens' Bank v. Los Angeles Iron etc. Co.*, 341.)

7. TRUST DEED SECURING MANY BONDS—JUDGMENT OF FORECLOSURE.—When a deed of trust has been given to secure many bonds, and a single bondholder brings suit to foreclose the deed of trust for interest on matured unpaid coupons, but with a complaint so framed as to authorize a sale of the entire mortgaged property, the substantial rights of the defendant are not injuriously affected by a judgment for the plaintiff, where it appears that all parties interested in the suit, including the trustee, were before the court, and that the bondholders, not parties, came in and surrendered their bonds and coupons. (*Citizens' Bank v. Los Angeles Iron etc. Co.*, 341.)

8. SPENDTHRIFT TRUSTS—SUPPORT OF WIFE AND CHILDREN.—The income of a strict spendthrift trust cannot be attached in the hands of the trustee, by virtue of a warrant of seizure issued by a magistrate at the instance of the board of charities and correction, for the maintenance of the wife and children of the cestui que trust, whom he has deserted. (*Board of Charities v. Lockard*, 817.)

9. SPENDTHRIFT TRUSTS.—A provision in a will that "all moneys or legacies hereby bequeathed are to be paid to the legatees in person, and to no one else, and shall not be assignable or transferable, nor subject nor liable in any way whatever for any debts or obligations of any of said legatees, heretofore or hereafter created," creates a strict spendthrift trust. (*Board of Charities v. Lockard*, 817.)

USURY.

USURY—CONFLICT OF LAWS.—If a contract for the payment of interest is valid under the law of the state where made, the defense of usury cannot be set up against it in another state, or

cially when the interest agreed upon is not excessive in the latter
ite. (Binghampton Trust Co. v. Auten, 295.)

See Building and Loan Associations.

VENDOR AND PURCHASER.

1. VENDOR AND PURCHASER—VENDORS' LIENS—STATUTE OF LIMITATIONS.—If a husband, who is a joint grantee, gives his individual notes for the purchase money of the land conveyed, and returns the deed to the grantor and procures a new one executed to the wife alone, under which she takes possession and claims title, the vendor's lien for the unpaid purchase price follows the land into her hands, and her possession is in subordination thereto until the maturity of purchase money notes, at which time the statute of limitations begins to run against them; and, although she has knowledge when she takes possession that her husband owes for the land, the fact that he acted as her agent in procuring the second deed, or that he had made renewals or new promises as to such notes, to which she was not a party, and of which she had no knowledge, does not prevent such running of the statute of limitations against the vendor's lien. (Poindexter v. Rawlings, 869.)

2. VENDOR AND PURCHASER—VENDOR'S LIEN—STATUTE OF LIMITATIONS.—The possession of a vendee cannot become adverse, and the statute of limitations cannot begin to run against the vendor's lien for the unpaid purchase price, until the maturity of the notes given therefor. The statute does not begin to run from the execution of the deed. (Poindexter v. Rawlings, 869.)

3. VENDOR AND PURCHASER—VENDOR'S LIEN—NEW PROMISE.—The renewal of a purchase money note given for land, or a new promise within six years after its maturity, is sufficient to prolong the life of the vendor's lien, and, as against the vendee in possession, put the statute of limitations in operation against it, only from the maturity of the renewal or from the date of the new promise. (Poindexter v. Rawlings, 869.)

4. VENDOR AND VENDEE—VENDOR'S LIEN—ESTOPPEL BY SURRENDER OF OLD DEED AND EXECUTION OF NEW ONE.—If a husband, who is a joint grantee with his wife, returns the deed to the grantor and obtains a new one executed to the wife alone, under which she takes possession and claims title, such transaction passes no additional interest to her, but estops her from asserting ownership under the original deed, and estops her husband from asserting his joint interest as against her, and hence he has no interest in the land subject to the vendor's lien. (Poindexter v. Rawlings, 869.)

VETERANS.

See Constitutional Law, 7.

WAGES.

See Attachment, 21, 22; Constitutional Law, 16.

WAREHOUSEMEN.

1. WAREHOUSEMEN—NEGOTIABILITY OF WAREHOUSE RECEIPTS.—While the statute of Oregon makes a warehouse receipt negotiable, regardless of its form, in the sense that a trans-

fer thereof by indorsement carries the absolute title to the commodity represented by the receipt, and does not charge a bona fide purchaser for value with knowledge of any notice of equities between the original parties, it does not give to such receipts all the attributes of negotiable paper. (*Anderson v. Portland Flour Mill Co.*, 771.)

2. **WAREHOUSEMEN — WAREHOUSE RECEIPTS — PAROL EVIDENCE TO VARY—NEGOTIABILITY.**—The rule prohibiting the admission of parol testimony to charge one not bound upon the face of an instrument does not apply to a warehouse receipt in that respect the receipt is a simple contract, and such evidence is admissible to show that, although executed by and in the name of an agent, it was in fact the contract of the principal, and the latter is bound thereby. (*Anderson v. Portland Flour Mill Co.*, 771.)

WARRANTY.

See Sales, 6-9.

WATERS AND WATERCOURSES.

1. **WATERCOURSES—OBSTRUCTION OF—DAMAGES.**—If the owner of timber floats such masses thereof into a boom as to create a jam in such boom and up the river along a riparian owner's land, covering the surface of the stream, rising above the surface thereof several feet, and extending much below, thereby raising the water and throwing it out upon the land of the riparian owner, to his damage, or whether raised higher than it would have been in the absence of the jam, the current of the river by reason of the timbers was diverted from the channel and made to run across such riparian owner's land, to his great damage, the owner of the timber is liable to the land owner, though he had a right to construct and use the boom, though it was properly constructed, and though all care and diligence were used to prevent the formation of the jam when the timbers came into the boom, and to relieve the jam after its formation. (*Alabama Lumber Co. v. Keel*, 265.)

2. **WATERCOURSES—OBSTRUCTION OF—DAMAGES.**—In an action by a riparian owner to recover for injury to his land resulting from defendant's floating too great a quantity of timber down the stream, thereby causing a jam, it is for the jury to decide whether the amount of timber shown to have been thus floated was an unreasonable use of the stream. (*Alabama Lumber Co. v. Keel*, 265.)

3. **WATERCOURSES—OBSTRUCTION OF.**—In an action by a riparian owner to recover for injury to his land resulting from defendant's floating too great a quantity of timber down the stream, thereby causing a jam, although it is shown that one of the causes which led to the injury complained of was an unusual flood, yet if it is shown that if it had not been for the wrongful use of the stream in floating the timbers the damage to the land would not have occurred, the land owner is entitled to recover. (*Alabama Lumber Co. v. Keel*, 265.)

4. **WATERCOURSES — OBSTRUCTION OF — EFFECT ON OTHER LANDS.**—In an action by a riparian owner to recover for injury to his land by reason of an overflow caused by defendant's floating too great a quantity of timber down the stream, thereby causing a jam below the riparian owner's land, evidence as to whether other tracts of land belonging to other people, and located on the same stream above and below such jam, were over-

lowed is irrelevant and inadmissible. (Alabama Lumber Co. v. Keel, 265.)

WILLS.

1. WILLS—TESTAMENTARY CAPACITY—EVIDENCE.—Want of testamentary capacity is not shown by the testimony of witnesses, including physicians, called to express the opinion that the testatrix was not fit to do business or to make a will, if such opinion is not based upon facts sufficiently indicating the disappearance of the intelligence needed when she came to dispose of her property. (Englert v. Englert, 808.)

2. WILLS.—DELUSIONS OR HALLUCINATIONS not relevant to the making of a will, and with nothing to show that it resulted therefrom, are not sufficient ground for setting it aside. (Englert v. Englert, 808.)

3. WILLS—UNDUE INFLUENCE—SOLICITATIONS.—Undue influence, however used, in order to avoid a will, must destroy the free agency of the testator at the time and in the very act of making the will. Solicitations, however importunate, cannot of themselves constitute undue influence. Though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate. (Englert v. Englert, 808.)

4. WILLS—DEVISE CREATING LIFE ESTATE.—A devise of lands to the testator's daughter, "to have and to hold during her natural life, and at her death to go to her legal heirs," creates only a life estate in the daughter, with remainder to her children or their descendants. In such devise, the words "legal heirs" are equivalent to the words "children or their descendants." (Waller v. Martin, 882.)

5. WILLS—DEVISE FOR LIFE—POWER OF DISPOSITION. If land is devised to a person for life, with remainder to her children, absolute power of disposition is not conferred upon the devisee by a subsequent provision in the will giving her power to sell the lands, but requiring her to reinvest the proceeds in other lands, taking a deed therefor to herself for life with remainder to her children, and appointing a trustee to see that this part of the will is strictly complied with. (Waller v. Martin, 882.)

6. WILLS—DISPOSITION OF ONE'S OWN DEAD BODY.—A man cannot by will dispose of his dead body, for there is no property in it, and it does not form a part of his estate. (Enos v. Snyder, 830.)

WITNESSES.

1. WITNESSES, CREDIBILITY OF—SHOWING STATE OF FEELINGS OF.—It is competent to show the state of feeling of a witness when called to testify, for the purpose of giving the jury all the facts necessary to a full and fair consideration of his evidence, and to enable them to determine the degree of credit to be accorded thereto. (Lodge v. State, 23.)

2. WITNESSES—BIAS OF—PARENTS' ILL-WILL KNOWN TO CHILD.—Where a child of fourteen is the chief witness for the prosecution in a criminal case, it is proper upon cross-examination to ask such child as to the state of bad feeling of its parents toward the defendant, if it be a fact, and such state of feeling is known to the child, such evidence being admissible and competent to affect the credibility of the witness. (Lodge v. State, 23.)

3. TRIAL—IMPEACHMENT OF PERSONS NOT CALLED AS WITNESSES.—EVIDENCE tending to impeach persons who do not testify as witnesses in the case is inadmissible. (*Lodge v. State*, 23.)

4. WITNESSES—IMPEACHMENT OF—EVIDENCE OF BAD CHARACTER.—The testimony of a witness may be impeached by proof of general bad character. (*Lodge v. State*, 23.)

5. WITNESSES—IMPEACHMENT.—EVIDENCE of statements made by a witness offered for the purpose of contradicting him is inadmissible, if such statements are neither contradictory to, nor inconsistent with, his testimony upon any material point. (*Pedigo v. Commonwealth*, 566.)

6. TRIAL—RIGHT TO EXAMINE QUESTION—OBJECTION TO EVIDENCE.—Where no other objection than the one taken can be made to a question, it is not prejudicial error to deny to opposing counsel the right to examine the question before it is put. (*State v. Doherty*, 951.)

7. WITNESSES—EXPERT—HYPOTHETICAL QUESTION.—A hypothetical question asked of a medical expert witness may be based upon a portion of the testimony in the case. (*State v. Doherty*, 951.)

8. EVIDENCE OF EXPERTS—FORM OF QUESTIONS.—It is not necessary to questions propounded to expert witnesses that they shall postulate every fact of which there is evidence before the jury. Such questions are unobjectionable if they hypothesize a state of facts which the jury is authorized to find. (*Morrisett v. Wood*, 127.)

9. EVIDENCE—OPINION OF EXPERTS ON INSANITY.—The testimony of experts introduced for the purpose of establishing insanity, or mental unsoundness, if paid for, should be received with great caution and carefully weighed by the jury. An expert physician testifying on such a matter is entitled to charge a reasonable fee for his professional opinion. (*Bateman v. Ryder*, 910.)

WRIT OF ASSISTANCE

See Receivers.

WRIT OF REVIEW.

1. WRIT OF REVIEW.—AN ANSWER TO A PETITION for a writ of review, denying its allegations, is irregular practice. The return to the writ constitutes the answer as well as the evidence, and the case is heard thereon. (*Stumpf v. Board of Supervisors*, 350.)

2. WRIT OF REVIEW—INADMISSIBILITY OF HEARSAY EVIDENCE.—UNSWORN STATEMENTS made before a board of supervisors as to the qualifications of signers to a petition to create a sanitary district are incompetent. Their repetition before a court in a proceeding to review the action of the board concerning the matter is mere hearsay. (*Stumpf v. Board of Supervisors*, 350.)

3. WRIT OF REVIEW—PROOF OF JURISDICTIONAL FACTS.—The jurisdiction of a board of supervisors to create a sanitary district, upon petition, depends upon the fact of the petitioners being residents and freeholders within the proposed district, and of their signatures being genuine; and, where the statute does not prescribe the character of the proof by which these matters should be determined, they must be established in accordance with the rules of evidence. (*Stumpf v. Board of Supervisors*, 350.)

4. WRIT OF REVIEW.—THE SUFFICIENCY OF THE EVIDENCE may be reviewed by an appellate court when the question involved is, whether jurisdictional facts were or were not proved in the inferior court or tribunal. (Stumpf v. Board of Supervisors, 150.)

5. WRIT OF REVIEW—ESTABLISHMENT OF JURISDICTIONAL FACTS—REVIEW OF EVIDENCE.—In a proceeding, by petition, before a board of supervisors to create a sanitary district, the decision of the board as to the sufficiency of the evidence to establish jurisdictional facts is reviewable upon a writ of review, but it is only such evidence as was heard by the board upon questions essential to their jurisdiction that can be considered in determining whether the board acquired jurisdiction. (Stumpf v. Board of Supervisors, 150.)

See Appeal.

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